Supreme Court of the United States

OCTOBER TERM, 1965

No. 219

JOHNNIE K. BAXSTROM, PETITIONER

vs.

R. E. HEROLD, DIRECTOR, DANNEMORA STATE HOSPITAL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

Form 478-D.M.H.—(Rev. May 1941)

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

DANNEMORA STATE HOSPITAL

RECEIVED
AUG 20 1965
OFFICE OF THE CLERK
SUPREME COURT, U.S.

FORM FOR THE CERTIFICATION OF INSANE PRISONERS AFTER THE EXPIRATION OF THEIR TERMS, PURSUANT TO ARTICLE 15, SECTION 384 OF THE CORRECTION LAW.

Section 384. "Certification of insane prisoners after the expiration of their terms. 1. Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director such prisoner continues insane, the director shall apply to a judge of a court of record for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge. The court in which such proceedings are instituted shall if satisfied that such person may require care and treatment in an institution for the mentally ill, issue an order directing that such person be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such person by agreement between the heads of the two departments. The costs necessarily incurred in determining the question of insanity, including the fees of the medical examiners, shall be a charge upon the amount appropriated for the support and maintenance of the Dannemora state hospital, and be paid in the same manner as are other expenses of such hospital.

"2. A patient committed to the custody of the commissioner of mental hygiene and placed in an appropriate institution in the department of mental hygiene or the department of correction pursuant to the provisions of this section may at any time during the period of his commitment be transferred to an appropriate state institution in the department of mental hygiene or in the department of correction, which has been designated for the custody of such patient by agreement between the heads of the two departments.

"3. All persons retained in Dannemora state hospital pursuant to a valid order of retention issued in accordance with the provisions of this section prior to September first, nineteen hundred sixty-one shall be deemed to have been committed to the custody of the commissioner of mental hygiene pursuant to subdivision one of this section and shall be deemed to have been placed in the custody of Dannemora state hospital by designation of the commissioner of mental hygiene and the commissioner of correction pursuant to subdivision one of this section. Any such patient in the Dannemora state hospital may be transferred to any appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such patient by agreement between the heads of such departments."

[fol. 2]

PETITION

(6)

STATE OF NEW YORK

SURROGATE'S COURT: CLINTON COUNTY

IN THE MATTER OF THE APPLICATION OF
W. C. Johnston, M. D.
DIRECTOR OF DANNEMORA STATE HOSPITAL
FOR THE CERTIFICATION OF
John K. Baxstrom #6887
AN ALLEGED INSANE PRISONER

The Petition of W. C. Johnston, M. D. respectfully shows to this Court

(1) That he is the Director of Dannemora State Hospital, located in the Village of Dannemora, County of Clinton, State of New York.

(2) That the above named John K. Baxstrom is now a prisoner confined in said Dannemora State Hospital, that his term of imprisonment is about to expire and, in the opinion of your Petitioner, such prisoner continues insane.

(3) That the facts upon which the application is based are as follows:

(The petition should state the facts observed by, or the information known to, the petitioner, which would tend to show the existence of mental illness, such as irrational acts or statements, attempts at suicide and attempts or threats to injure others. It is important to describe any change that has occurred in the behavior and character of the patient.)

This patient was admitted here on June 1, 1961 from Attica Prison. He is suffering from epilepsy and when having fits, he is violent and dangerous. He has had several epileptic seizures since his admission and is still in need of medication and hospitalization. His diagnosis is Psychosis due to Convulsive Disorder, Epileptic Deterioration.

(4) That he verily believes it to be for the best interest of the said person that an order be granted directing his certification to the custody of the Commissioner of Mental Hygiene.

(5) Upon information and belief that the following are the names and addresses of living close relatives of the patient: (All must be given.)

fol. 3]

Name	Approximate age	Number and street	City, town or P.O.
Willie Baxstrom		Deceased	
Sarah(Carr) Baxstrom		Deceased	
Mrs. Mary Smith		2920 Westwood Ave.	Baltimore, Maryland
Alberta Ceiley	42	519 Dracena St.	Bakersfield, Calif.
Annie Baxstrom	17	"	"
Janie Baxstrom	16	"	"
Viola Baxstrom	15	"	"
Mary Baxstrom	14	"	"
Willie Mae Baxstrom	13	"	"
Elizabeth Baxstrom	12	"	"
Johnnie Baxstrom, Jr.	11	"	"
James B. Baxstrom	10	"	"
Charles Baxstrom	(Add sheet if necessary)		"

herefore, upon this petition and the medical certificate(s) of examining physicians hereto annexed, your petitioner that an order be granted certifying that the said person is in need of care and treatment and committing him to ustody of the Commissioner of Mental Hygiene.

W. E. Thurston M.D.
(Petitioner's signature)

Director
Dannemora State Hosp., Dannemora, N.Y.
(Petitioner's address)

ted November 22, 1961 19

MEDICAL CERTIFICATE(S) OF EXAMINING PHYSICIANS

(Medical certificate(s) shall be filled out only by two examining physicians)

(a) History Obtained by Physicians

ormation furnished by Records State Hosp of Dannemora N. Y.
s a Custodian of the patient.
Patient is at Dannemora county of Clinton
y: state or country USA; if foreign, date of arrival in U. S.
f entry Steamship or line
nd place of birth 12 Aug 1918 Greensboro N.C. Is he a citizen of the U. S.? Yes
a legal resident of New York State? Yes If so, of what county, city or town Syracuse N.Y.
ong has he resided in New York State? 12 Yrs Address of patient 511 Almond St
(No. street) (City or town)
than five years in New York State, indicate number of years and States of previous residence

; color Black occupation Const. worker single, ~~married~~, ~~widowed~~, separated, ~~divorced~~ Religion Prot.
(Strike out words not required)
ent a veteran? Yes ✓ No Which war? WW II
n of service Army Service Serial No. 34850265
of discharge Hon. Compensation or Pension No.
lity for which veteran is receiving compen[illegible] or pension

[fol. 4]

Birthplace of father USA : of mother USA

Legal residence of father, if living —

Legal residence of mother, if living —

Name and address of nearest known relative (state relationship), committee or correspondent sister
Mrs Mary Smith 2920 Westwood Ave Balt. Md.; Sarah Sherman Bd. 3
Corfu, Ny

Has the patient had any mentally ill relatives? —

If so, state what relationship and whether paternal or maternal —

Have any of the relatives been in institutions for mental illness? —

If so, state name and relationship and give name and location of institution —

Has the patient been considered as of normal mental standard? yes

Institution or institutions where cared for in previous attacks, if any (give dates) —

Has patient been discharged from last institution? —

Has the patient had treatment for syphilis? No

To what extent does he use liquor? Mod tobacco? mod drugs? No

When did present attack begin? —

What is characterized by depression, excitement, untidiness, destructiveness, suicidal or homicidal tendencies, delusions, hallucinations, etc.? Epileptic stupor, assaultive, aggressive

What was first noticed? aggressiveness

Past significant physical disease Epilepsy

(b) Examination by Physician(s)

Physical condition (including any special test report) physical health good

Mental condition: The conduct of the patient (including the statements made to us by others) has been
Jolly, complains is irritable, confused, aggressive

[fol. 5]

The patient showed the following psychiatric signs and symptoms — lacks insight

Does the patient show a tendency to injure himself? no or to injure others? possibly

What dangerous tendencies does the patient show? —

We (I) W W JOHNSON (Print name plainly) a legal resident of Plattsburgh

county of Clinton State of New York and IRA A ROWLSON (Print name plainly)

a legal resident of Plattsburgh, county of Clinton, and State aforesaid, do (severally) certify with the exceptions which are hereinafter noted, as follows:

1. I am a reputable physician, duly licensed to practice medicine in New York State, and have been in the actual practice of my profession for at least three years.

2. I have with care and diligence personally observed and examined on the date of the certificate, namely, on the 24 day of Nov 1961 John K Boxstrom #6887 (Insert name of patient) now residing or being at Dannemora, in the county of Clinton and as a result of such (joint) examination, find and hereby certify to the fact that his condition is such as to require care and treatment in a state institution for the mentally ill, under the provisions of the statutes.

3. I have formed this opinion from the history of the case and my examination of the patient as given above.

4. It is my opinion that personal service on said patient would be detrimental to said patient for the following reasons:

he will be pound

5. I hereby certify that the facts stated and information contained in this certificate are true to the best of my knowledge and belief.

William W Johnson, M.D.

Plattsburgh, N. Y. (Address)

Ira A Rowlson M.D

Plattsburgh N Y (Address)

Dated 24 Nov 1961

[fol. 6]

(c) Examination by Physician

Physical condition (including any special test report) _____

_____

_____

_____

Mental condition: The conduct of the patient (including the statements made to us by others) has been _____

_____

_____

_____

_____

The patient showed the following psychiatric signs and symptoms _____

_____

_____

_____

_____

_____

Does the patient show a tendency to injure himself? _____ or to injure others? _____

What dangerous tendencies does the patient show? _____

_____

_____

I, _____ a legal resident of _____
(Print name plainly)

county of _____, State of New York, certify with the exceptions which are hereinafter noted, as follows:

1. I am a reputable physician, duly licensed to practice medicine in New York State, and have been in the actual practice of my profession for at least three years.

2. I have with care and diligence personally observed and examined on the date of the certificate, namely, on the _____ day of _____, 19__, _____ now residing or
(Insert name of patient)
being at _____, in the county of _____, and as a result of such examination, find and hereby certify to the fact that his condition is such as to require care and treatment in a state institution for the mentally ill, under the provisions of the statutes.

[fol. 7]

3. I have formed this opinion from the history of the case and my examination of the patient as given above.

4. It is my opinion that personal service on said patient would be detrimental to said patient for the following reasons:

_____

_____

5. I hereby certify that the facts stated and information contained in this certificate are true to the best of my knowledge and belief.

_____

Dated _____, 19____ _____
(Address)

CERTIFICATE OF JUSTICE OR JUDGE RELATING TO PERSONAL SERVICE

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

Before the Hon. Robert S. Long, ~~Justice~~ Surrogate ~~or Judge~~

on the 6th day of Dec, 1961

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

(1) I do hereby certify that, as appears by the affidavit of service herein, personal service has been made upon the alleged mentally ill person above named on November 24, 1961 and upon Miss. Mary Smith Mrs. Albert Smith who is Sister Wife (State relationship) of the alleged mentally ill person, ~~or with whom he resides or at whose house he is (strike out words not required)~~ by 2920 Westwood Avenue 519 Dracena St. Baltimore, Maryland Bakersfield, California who resides in the city, ~~town or village~~ of Unknown Unknown in the county of Unknown Unknown

[redacted]

_____

Robert S. Long
~~Justice~~ Surrogate ~~or Judge~~

[fol. 8]

Form 477a-D.M.H.—(May 1961)

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

SERVICE OF NOTICE UPON THE ALLEGED MENTALLY ILL PERSON AND/OR OTHERS

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

To Miss Mary Smith, 2920 Westwood Avenue, Baltimore, Maryland
(Name of person served)

TAKE NOTICE that on the petition of W. C. Johnston, M. D.
and the certificate(s) of Doctors William W. Johnson and
Ira A. Rowlson, an application will be made before the
Honorable Robert S. Long, ~~Justice~~ Surrogate ~~or Judge~~ of the Surrogate's
Court at the Surrogate's Office in (city, ~~town or village~~) Plattsburgh, New York
at 10:00a. m., on the 6th day of December, 1961,
for an order certifying said alleged mentally ill person to the custody of the Commissioner of Mental Hygiene.

AFFID

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATI
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

STATE OF NEW YORK:
COUNTY OF CLINTON } ss.:

Roland Tatro

#1-INSTRUCTIONS TO DELIVERING EMPLOYEE
☐ Deliver ONLY to addressee ☐ Show address where delivered
(Additional charges required for these services)

RETURN RECEIPT
Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must always be filled in)
× Mary Smith

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED: 11/27/61

ADDRESS WHERE DELIVERED (only if requested in item #1)

CSC—10—71588-4 GPO

11 years of age, and resides at Dannemo[illegible], ——, that on the 27th day
of November, 1961, at Dannemora, New York
he served a notice of application for an order adjudging such person to be mentally ill upon
Miss Mary Smith, 2920 Westwood Ave., Baltimore, Maryland
(Name of person served)
by delivering a true copy of said notice personally ~~by Placing in U.S. Mail, Registered, Return Receipt Requested.~~ to the
the served served as aforesaid to be sister of alleged mentally ill person
(State whether person served is the alleged mentally ill person. If not, state relationship)

Sworn to before me this 24th
day of November, 1961
Orew F. Henry
Notary Public
(Orew) F. HENRY
NOTARY PUBLIC IN THE STATE OF NEW YORK
RESIDING IN THE COUNTY OF CLINTON
MY COMMISSION EXPIRES MARCH 30, 1962

Roland Tatro
(Signature of server of notice)

[fol. 9]

Form 477a-D.M.H.—(May 1961)

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

SERVICE OF NOTICE UPON THE ALLEGED MENTALLY ILL PERSON AND/OR OTHERS

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

To Mrs. Alberta Smith, 519 Dracena St., Bakersfield, California
(Name of person served)

TAKE NOTICE that on the petition of W. C. Johnston, M. D.
and the certificate(s) of Doctors William W. Johnson and
Ira A. Rowlson, an application will be made before the
Honorable Robert S. Long, Justice, Surrogate ~~or Judge~~ of the Surrogate's
Court at the Surrogate's Office in (city, town or village) Plattsburgh, New York
10:00 a. m. on the 6th day of
for an order certifying said alleged mentally ill person to the

#1-INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Deliver ONLY to addressee ☐ Show address where delivered

(Additional charges required for these services)

RETURN RECEIPT

Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must always be filled in)

Alberta

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED: 11-28-61

ADDRESS WHERE DELIVERED (only if requested in item #1)

AFFIDAVIT O

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

STATE OF NEW YORK:
COUNTY OF CLINTON } ss.:

Roland A. Tatro, being duly sworn, says that he is over
21 years of age, and resides at Dannemora, New York; that on the 24th day
of November, 1961 at Dannemora, New York
he served a notice of application for an order adjudging such person to be mentally ill upon
Mrs. Alberta Smith, 519 Dracena Street, Bakersfield, California
(Name of person served)
by delivering a true copy of said notice personally ~~to the said person named therein~~ by placing in U.S. Mail, Registered, Return Receipt Requested.
He served served as aforesaid to be wife of alleged mentally ill person
(State whether person served is the alleged mentally ill person. If not, state relationship)

Sworn to before me this 24th
day of November, 1961

Oren F. Henry
Notary Public
(Official title)
OREN F. HENRY
NOTARY PUBLIC IN THE STATE OF NEW YORK
RESIDING IN THE COUNTY OF CLINTON
MY COMMISSION EXPIRES MARCH 30, 1962

Roland A. Tatro
(Signature of server of notice)

[fol. 10]

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

SERVICE OF NOTICE UPON THE ALLEGED MENTALLY ILL PERSON AND/OR OTHERS

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF

John K. Baxstrom #6887

AN ALLEGED MENTALLY ILL PERSON

To John K. Baxstrom #6887
(Name of person served)

TAKE NOTICE that on the petition of W. C. Johnston, M. D.
and the certificate of Doctors William W. Johnson
and Ira A. Rowlson, an application will be made before the
Honorable Robert S. Long Justice Surrogate ~~or Judge~~ of the Surrogate's Court
at the Surrogate's Office in (city, ~~town or village~~) Plattsburgh, New York
at 10:00 a.m., on the 6th day of December, 1961, for an order
committing said alleged mentally ill person to the custody of the Commissioner of Mental Hygiene.

Wincenty Natkanski, M. D.
(Name of server of notice)

AFFIDAVIT OF SERVICE

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF

John K. Baxstrom #6887

AN ALLEGED MENTALLY ILL PERSON

STATE OF NEW YORK
COUNTY OF CLINTON } ss.:

Wincenty Natkanski, M. D., being duly sworn, says that he is over
21 years of age, and resides at Dannemora, New York; that on the 24th day
of November, 1961 at Dannemora, New York
he served notice of application for an order adjudging such person to be mentally ill upon
John K. Baxstrom #6887
(Name of person served)
by delivering a true copy of said notice personally and leaving the same with him. He further says that he knew
the person served as aforesaid to be alleged mentally ill person
(State whether person served is the alleged mentally ill person. If not, state relationship)

Sworn to before me this 24th
day of November, 1961

Oren F. Henry
Notary Public
(Official title) OREN F. HENRY

Wincenty Natkanski M.D.
(Signature of server of notice)

NOTARY PUBLIC IN THE STATE OF NEW YORK
RESIDING IN THE COUNTY OF CLINTON
MY COMMISSION EXPIRES MARCH 30, 1962

[fol. 11]

ORDER OF HEARING

(If a hearing before a judge or referee be granted upon the demand of a relative or near friend or upon the motion of the judge, the following form shall be used, otherwise it should be omitted.)

STATE OF NEW YORK

SURROGATE'S COURT, COUNTY OF CLINTON

Before the Hon. Robert S. Long, Justice, Surrogate ~~or Judge~~

on the 6th day of Dec, 1961

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom #6887
AN ALLEGED MENTALLY ILL PERSON

An application for an order of certification of the above person, based upon the petition of W. C. Johnston, M.D. and upon a medical certificate dated November 24, 1961 having been made, and (state name of relative and degree of relationship, or if none, name of near friend) W. C. Johnston, M. D. having demanded a hearing upon such application, it is hereby ORDERED, That a hearing on such application for an order of certification be had before the Honorable Robert S. Long, Justice, Surrogate ~~or Judge~~ of the Surrogate's Court at the Surrogate's Office in (city, ~~town or village~~) Plattsburgh, New York County of Clinton on the 6th day of December, 1961, at 10:00 A.M. at which time testimony shall be heard touching the alleged mental illness of the aforesaid person, and if it be deemed advisable, said person may be examined either in or out of court.

The judge may (or if a referee be appointed, the referee herein named shall) hear such testimony and make such examination and report the same at once with the decision (or opinion) as to the mental illness of such person.

And that this order be served upon W. C. Johnston, M. D., the petitioner, and the following named persons:

John K. Baxstrom #6887 of Dannemora State Hospital
Miss Mary Smith, 2920 Westwood Avenue Baltimore, Maryland
~~Mrs.~~ Alberta Smith, 519 Dracena Street of ~~Bakersfield~~, California

Robert S. Long
(Justice, Surrogate ~~or Judge~~)

DECISION OF COURT AFTER HEARING

(Decision of court to be used only if a hearing is had)

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom, #6887
AN ALLEGED MENTALLY ILL PERSON

A hearing having been had upon the application of W. C. Johnston, M.D., for an order certifying that the said person is in need of care and treatment and committing him to the custody of the Commissioner of Mental Hygiene to be placed in an appropriate state institution of the Department of Mental Hygiene or of the Department of Correction as may be designated for the custody of such person by agreement between the heads of the two departments on the 6th day of December, 1961, and testimony having been taken as required by law, I do hereby decide that the said alleged mentally ill person is in need of observation and treatment in a state institution for the care and treatment of the mentally ill.

Dated the 6th day of December, 1961

Robert S. Long
(Justice, Surrogate ~~or Judge~~)

[fol. 12]

ORDER OF CERTIFICATION

STATE OF NEW YORK

Surrogate's COURT, COUNTY OF Clinton

Before the Hon. Robert S. Long, Justice, Surrogate ~~or Judge of~~ of Clinton
(Print name plainly)

~~County~~ county, city ~~or town~~ of Plattsburgh on the 22 day of November, 1961,

IN THE MATTER OF
AN APPLICATION FOR THE CERTIFICATION
OF
John K. Baxstrom, #6887
AN ALLEGED MENTALLY ILL PERSON

Upon the petition of Dr. C. Johnston, M.D., dated November 22, 1961 and (a) medical certificate(s) made by two examining physicians, which medical certificate(s) are dated on the 22nd day of November, 1961, and on the 22nd day of November 1961, and which are annexed hereto and upon such other facts and information as were produced before me (or a referee appointed by me), and being satisfied that the above alleged mentally ill person may require mental care and treatment in a state institution for care and treatment of the mentally ill within the meaning of the statute, and that he is not in confinement under a criminal charge, it is therefore hereby

ORDERED, that the said John K. Baxstrom #6887 be committed to the custody of the Commissioner of Mental Hygiene to be placed in an appropriate state institution of the Department of Mental Hygiene or of the Department of Correction as may be designated for the custody of such person by agreement between the heads of the two departments.

ORDERED, That the director of the said institution forthwith at the time of the admission of said alleged mentally ill person to said institution, forward a verbatim copy of the entire proceedings herein to the office of the Clerk of Clinton County.

ORDERED, That the said papers so sent shall be sealed in the office of the County Clerk of _____ County, and be exhibited only to the parties to the proceedings, or someone properly interested, upon the order of the Court.

Dated December 6, 1961.

Rob't S. Long
(Print name) Surrogate ~~or Judge~~

(A copy of the entire proceedings must also be filed in the Department of Mental Hygiene when the patient is in a Department of Corrrection institution.)

[fol. 13]

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYGIENE

PETITION, CERTIFICATE AND ORDERS

In the Case
of
John K. Baxtrom

Resident of Syracuse, N.Y.
County Onondaga
Institution Dannemora State Hospital
Date of admission June 1, 19 61
No. of case book Page
No. for year 45
Consecutive No. 6887
Identification No. 78 97 55
Date of order of certification December 6, 19 61
Copy sent to clerk of Clinton County
on December 7, 1961
Copy sent to Department of Mental Hygiene
(Not applicable to Rose Institutions)
Dept. of Mental Hygiene)
on December 7, 1961

I, the Director of the Dannemora State Hospital,
do hereby certify that the document together with
the papers annexed hereto, on which the words of
this certificate are impressed, is a true copy of
the order and all the papers upon which the above
named patient was admitted to this hospital.

Director

RECEIVED
DANNEMORA STATE HOSPITAL
DEC 7 - 1961

[fol. 14]

IN THE SURROGATE'S COURT, COUNTY OF CLINTON, NEW YORK

[File Endorsement Omitted]

IN THE MATTER OF THE APPLICATION OF
W. C. JOHNSTON, M. D., Director of the Dannemora State Hospital for the Certification of

JOHN K. BAXSTROM, # 6887, Criminal Index # 58
An Alleged Insane Prisoner.

A proceeding held at the Surrogate's Court Chambers, Plattsburgh, New York, at 10:00 A. M., before Honorable Robert S. Long, Clinton County Surrogate, December 6, 1961.

THE COURT: Are you John K. Baxstrom?

PATIENT: Yes, sir.

THE COURT: Mr. Baxstrom, my name is Robert S. Long and I am the Surrogate Judge of the County of Clinton. Surrogate's Court is known as a Court of Record under the laws of the State of New York, and the Hospital where you are a patient is located at Dannemora, New York, which is within the boundaries of Clinton County.

Dr. Johnston, as Director of the State Hospital, on or about November 22, 1961 filed certain papers in Surrogate's Court of this County, which had to do with you. These papers, among other things, stated that the time you owed the State of New York was about to expire, [fol. 15] and that, in his opinion, you were still mentally ill and still in need of hospital and institutional care. Because of these facts, I asked Dr. Johnson, who is in no way related to Dr. Johnston, Director of the Dannemora State Hospital and Dr. Rowlson, both of the City of Plattsburgh to go to the hospital and examine you and your case history. These two doctors have certified to me, in writing, that they did go to the Hospital at Dannemora, New York, and they did examine you and your case

history and that, in their opinion, you are still mentally ill and still in need of hospital and institutional care.

A notice that this hearing was to take place here today was sent by registered mail to Alberta Smith, 519 Dracena Street, Bakersfield, California, and also, a notice was sent to Miss Mary Smith, 2920 Westwood Avenue, Baltimore, Maryland.

Now, besides yourself and myself here today, Mrs Catherine L. McCarthy is the lady sitting in front of you. She is a stenographer and she is making stenographic notes of what transpires at this hearing. Standing near you is an officer on duty at the Dannemora State Hospital, John Mytych of Cadyville, New York. On your right, Mr. Baxstrom, is Charles H. Lewis, an attorney who resides at Peru, New York. He is the Assistant Attorney General, and it is his duty to appear for The People of the State of New York in such cases as this. On his right and my left is Dr. Ross E. Herold, Assistant [fol. 16] Director of the Dannemora State Hospital, who appears in such cases as this.

THE COURT: (Addressing Dr. Herold) Have you heard from any member of this man's family?

DR. HEROLD: No.

THE COURT: At this time, Mr. Baxstrom, I am going to take the testimony of Dr. Herold. At the conclusion of his testimony you have the right to ask the Doctor any question you care to regarding your matter and you also have the right to ask Charles H. Lewis, the Assistant Attorney General any questions, or myself—any one, two or three of us, and you also have the right to make any statement you care to regarding this whole matter.

DR. ROSS E. HEROLD, being duly sworn, testified as follows: —

EXAMINATION BY MR. LEWIS.

Q Your full name, Doctor?
A Ross E. Herold.
Q What is your occupation?
A Assistant Director of the Dannemora State Hospital.
Q Doctor, are you duly licensed to practice medicine in the State of New York?

A I am.

Q Do you specialize in any field of medicine?

A Yes. Psychiatry.

Q Will you please state your qualifications and educa-
[fol. 17] tional training and experience in the field of medicine and psychiatry?

A Graduated in medicine from the University of Toronto, Canada in 1924. Licensed to practice medicine in New York State in 1925. I was with the Department of Mental Hygiene until 1942. From 1942 to 1946 I was on active duty with the United States Navy. Since February 1st, 1946, I have been Assistant Director of the Dannemora State Hospital. I also am a qualified psychiatrist under the laws of the State of New York and have taken post-graduate courses at Columbia University.

Q All right, Sir. Doctor, did you have an opportunity to examine and observe the patient, John K. Baxstrom, who is now before this Court?

A I have.

Q When did you last see him?

A Yesterday.

Q That would be December 5th, 1961, is that true?

A Yes, sir.

Q Are you familiar with his case history, which is kept in the regular course of business at the Dannemora State Hospital, pertaining to this patient?

A I am.

Q Doctor, from your medical training and experience and from your observations and examinations of the patient and from his case history, have you now been able to form an opinion as to whether this man is now
[fol. 18] mentally ill and in need of further institutional care?

A I have formed an opinion that he is still mentally ill and in need of institutional care.

Q Have you formed an opinion as to a diagnosis of his particular type of mental illness?

A Yes. Psychosis due to epileptic deterioration.

Q And it is your opinion, Doctor, that he should have further care in a hospital, such as the Dannemora State Hospital?

A Yes. That is my opinion.

THE COURT: Has this man been examined by someone from the Department of Mental Hygiene?

DR. HEROLD: Yes. On November 27th, 1961.

THE COURT: Do you have any objection to his being transferred to any other institution, a civil institution, if, in the opinion of the Department of Mental Hygiene, he should be transferred?

DR. HEROLD: I have absolutely no objection.

MR. LEWIS: I move his commitment, pursuant to Section 384 of the Correction Law.

THE COURT: Do you have any question you would like to ask of Dr. Herold, Mr. Baxstrom?

THE PATIENT: Dr. Herold, I am at the Dannemora State Hospital since June first, right?

DR. HEROLD: Yes. You came to our hospital June first.

[fol. 19] THE PATIENT: I asked—I know that it is a mental hospital. Am I right? But I don't know how I got there.

DR. HEROLD: You don't know how you got there? You were sent to the Dannemora State Hospital by an order of transfer signed by A. J. May, Acting Warden of Attica Prison.

THE PATIENT: I know that I am an epileptic, but I did not think that that is a form of insanity. I would like to recommend, Sir, that the staff at the hospital review my case.

THE COURT: The question before me today, Baxstrom, is only what the doctors who are at the hospital and the doctors I sent up to examine you, believe your mental condition to be. Whether you stay at the Dannemora State Hospital, or whether you are transferred to some other civil hospital at or near your home is entirely up to the Department of Mental Hygiene and that has nothing to do with Dr. Herold or myself.

(Addressing Dr. Herold) Has this man been examined by Dr. Foster?

A Yes. November 27th, 1961.

THE COURT: (Addressing the Patient) You were examined by Dr. Foster on November 27th. He is a rep-

resentative of the Department of Mental Hygiene. He will make a report. If he reports that he thinks you are a subject for transfer to a civil hospital, then you will be [fol. 20] transferred. It is entirely up to that Department.

THE COURT: (Addressing Dr. Herold) Have you any objection if this man is transferred to a civil hospital if the Department of Mental Hygiene so decrees?

DR. HEROLD: None whatever.

THE COURT: And I, Sir agree with you. I have no objection to his transfer if the Department of Mental Hygiene so finds.

I hope that you will be transferred to a civil hospital. Good luck.

Hearing closed.

[Stenographer's Certificate to foregoing transcript omitted in printing.]

[fol. 21]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

WRIT OF HABEAS CORPUS—issued March 16, 1962

THE PEOPLE OF THE STATE OF NEW YORK

To Dr. W. C. Johnston, M. D., Director,
Dannemora State Hospital, Dannemora, New York

We command you, that you have the body of JOHN K. BAXSTROM by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said JOHN K. BAXSTROM is called or charged, before Hon. Michael E. Sweeney, a Justice of the Supreme Court of the State of New York, at the Court House in the City of Plattsburgh, New York, forthwith, on the 10th day of April, 1962 at 10 a.m. in the forenoon of that day, or as soon thereafter as the matter may be heard, to do and receive what shall then and there be considered, concerning the said JOHN K. BAXSTROM and have you then there this Writ.

Witness, Hon. Robert G. Main, one of the Justices of the said Court, the 16th day of March, 1962.

HALSEY J. STARK
Clerk

The within Writ is hereby allowed this 16th day of March, 1962.

/s/ Robert G. Main
J. S. C.

[fol. 22]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

IN THE MATTER OF THE APPLICATION OF JOHN K. BAXSTROM

RETURN TO WRIT OF HABEAS CORPUS—March 29. 1962

The following return to a Writ of Habeas Corpus heretofore granted by the Hon. Robert G. Main, Justice of the Supreme Court, is hereby respectfully made:

I. That W. C. Johnston, M. D. is the Director of the Dannemora State Hospital, and has the care and custody of all patients committed to that institution.

II. That at a Term of the County Court, held in and for the County of Monroe, at the Court House in the City of Rochester, State of New York, on the 23rd day of April 1959, John K. Baxstrom, the relator in the present matter was convicted of the crime of Assault 2°—Violation Section 242-4 Penal Law, and was thereupon sentenced to be imprisoned in the State Prison at Attica.

III. That the said relator was received at Attica Prison April 9, 1959 and subsequently on June 1, 1961 was duly transferred to the Dannemora State Hospital, where he is now detained. That such transfer from Attica Prison to the Dannemora State Hospital was made pursuant to law; that the order for such transfer is now in the possession of the respondent and the respondent begs leave to refer thereto upon the argument of this writ.

IV. That the full term of sentence of said John K. Baxstrom expired on December 18, 1961, and the patient was regularly committed to this hospital on December 6, 1961 as an insane person on the order of Hon. Robert S. Long, Judge of the Surrogate's Court, Clinton County, in accordance with Paragraph 384 of the Correction Law.

V. Section 384, Paragraph 3 of the Correction Law states: "Any such patient in the Dannemora State Hospital may be transferred to any appropriate state institution of the Department of Mental Hygiene or of the De-

partment of Correction as may be designated for the custody of such patient by agreement between the heads of such departments."

[fol. 23] VI. This patient was examined by Dr. Richard V. Foster, Assistant Commissioner for the Department of Mental Hygiene, on November 27, 1961 relative to a transfer to a Civil Hospital and was not considered to be suitable for care in a Civil Hospital.

VII. Deponent further alleges that the said John K. Baxstrom is, in his opinion, an insane person, and that he is in need of further hospital care and treatment.

VIII. That the said John K. Baxstrom is now presented before the Court in obedience to the Writ recently issued.

All of which is respectfully submitted.

Dated at Dannemora, N. Y. this 29th day of March 1962.

/s/ W. C. Johnston, MD.
Director, Dannemora State Hospital

[*Duly sworn to by W. C. Johnston, MD. jurat omitted in printing (all in italics)*]

[fol. 24]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

THE PEOPLE OF THE STATE OF NEW YORK, EX REL JOHNNY K. BAXSTROM, RELATOR

vs.

W. C. JOHNSTON, M. D., Director, Dannemora State Hospital, Dannemora, N. Y., RESPONDENT

Stenographer's Minutes of Proceedings had in the above-named matter, at a Regular Trial Term of the Supreme Court, held in and for the County of Clinton, in the Clinton County Court House, Plattsburgh, N. Y., on the tenth day of April, 1962.

BEFORE: HON. MICHAEL E. SWEENEY, Justice.

APPEARANCES:

The Relator, in person.

Louis J. Lefkowitz, Attorney General of the State of New York, by Charles H. Lewis, Esq., 24 Clinton St., Plattsburgh, N. Y., Assistant Attorney General, for the People.

[fol. 25] THE COURT: You are Johnny K. Baxstrom?
THE RELATOR: Yes, sir.
THE COURT: All right, you may proceed. You may go ahead.

(Mr. Lewis handed a copy of the return to the relator.)

THE RELATOR: (referring to photostatis document) Sir, in November 1959 I was committed as follows: First count. The deponent, on or about November 21, 1958, at the city of Rochester, Monroe County, New York, wilfully, wrongfully and feloniously assaulted Joseph M. C. McCarthy, thereby inflicting upon his person grievous bodily

harm; to wit, puncture wound of the left arm and forehead, two counts. On April 9, 1959, an information was read in open court to this defendant, by John C. Little, Jr., district attorney, charging the defendant with having been previously convicted of the crime of robbery in Circuit Court, Baltimore, Maryland, on December 17, 1954; defendant, having been duly advised of his rights by the court, defendant admitted being the same person mentioned and described therein.

[fol. 26] THE COURT: As I understand it, Mr. Baxtrom, from reading your papers here, it is your contention that your time has expired and you are entitled to an examination at this time as to your sanity, is that correct?

THE RELATOR: Yes, sir.

THE COURT: You feel your time has expired and that you are being held because of your mental condition, that you are entitled to have an independent doctor examine you, to have that matter heard in court, is that correct?

THE RELATOR: Yes, sir. One of the things I most care to refer to the court is I am a veteran of World War II, and my people got me an application for a V. A. hospital, which they got through New York also, and some application was sent to me to sign here in Dannemora State Hospital, which was mailed up to me and not to be opened, folded like this, one afternoon, for me to sign, the application went in to Prairie Point Hospital in Baltimore, Maryland, which is my home, and this is the receipt that they mailed back to me, which I am epileptic, have been ever since 1947, could have been before, I came out [fol. 27] of the Army, I don't know.

THE COURT: You have read the papers, Mr. Lewis. Is there any question about this man being entitled to an examination?

MR. LEWIS: No, sir, we would be happy to afford him the examination by an independent psychiatrist.

THE COURT: All right. I am going to grant your right to an examination here, and I would suggest Dr. Ian M. Kerr, he is from Potsdam, to make the examination, and will you see that that is carried through, Mr. Lewis?

MR. LEWIS: Yes, I will, sir.
THE RELATOR: I appreciate that, sir.
MR. LEWIS: I would like to state on the record, if the officials in Baltimore will take this man, I am sure New York State has no objection to it, we are more than happy to have these fellows transferred to another institution if they will take them. I will look into this.
THE COURT: All right.
THE RELATOR: Thank you, your honor.

[fol. 28]

[Reporter's Certificate to foregoing transcript omitted in printing.]

[fol. 29] At a Regular Trial and Special Term of the Supreme Court, held in and for the County of Clinton, at the Court House, Plattsburgh, N. Y.

* * * *

THE PEOPLE OF THE STATE OF NEW YORK, EX REL, JOHN K. BAXSTROM

-against-

DR. W. C. JOHNSTON, Director Dannemora State Hospital, Dannemora, New York.

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* * * *

May 3, 1962.

BEFORE: HON. MICHAEL E. SWEENEY, Justice.

APPEARANCES:

Louis J. Lefkowitz, Attorney General, by Charles H. Lewis, Assistant Attorney General, for the People.
John K. Baxstrom was present in person.

MR. LEWIS: Mr. Baxstrom.

THE COURT: You are John K. Baxstrom?

MR. BAXSTROM: Yes, sir.

THE COURT: And you have asked previously that you be examined by a doctor and have him report to the Court, is that correct?

MR. BAXSTROM: Yes, sir.

[fol. 30] THE COURT: And you have been examined?

MR. BAXSTROM: Yes, sir.

THE COURT: By Dr. Kerr here?

MR. BAXSTROM: Yes, sir.

THE COURT: All right. You may sit down.

DR. IAN MC DOUGAL KERR, being duly sworn as a witness in behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. LEWIS:

Q. Your full name, Doctor?

A. Ian McDougal Kerr.

Q. Where do you reside, sir?

A. Days Mill, Town of Hopkington, State of New York.

Q. What is your profession?

A. I am a physician and psychiatrist.

Q. Doctor, heretofore today I have asked you certain questions and you have given certain answers regarding your professional qualifications as a physician and psychiatrist. If I were now to ask you those same questions, Doctor, would you give those same answers?

A. I would, sir.

MR. LEWIS: I ask the Court to take judicial notice of the Doctor's qualifications as a psychiatrist.

THE COURT: I have heard the Doctor's qualifications in a previous hearing and they will pertain to all [fol. 31] the hearings here this morning.

MR. LEWIS: Thank you, sir.

Q. Doctor, heretofore and by order of this Court did you examine the person of John K. Baxstrom a patient at Dannemora State Hospital?

A. I did, sir.

Q. Where and when did that examination take place?

A. I examined John K. Baxstrom at Dannemora State Hospital April 27, 1962.

Q. This was a psychiatric examination, was it, sir?

A. Yes, sir.

Q. Will you please tell the Court the results of your examination?

A. During my examination Mr. Baxstrom told me he was forty-three years of age; gave me his date of birth as August 2, 1918. When I asked him why he had been transferred to Dannemora State Hospital, he told me that this was really a mistake.

He claims that whilst he was confined in Attica, that another inmate there told him that Dannemora was a much nicer place because they had television and so forth, and the patient claims that he asked the psychiatrist at Attica on three occasions if he might not be transferred to Dannemora; and that the only way in which this could [fol. 32] be achieved would be for the psychiatrist to say that he was insane.

He then went on to tell me that he has suffered from epilepsy since 1947. He first told me that he had his first seizure in Baltimore in that year, but then went on to say that while serving in the Army in Guam in 1945 he had a blackout of some description, which may have been an epileptic attack.

In 1947 he was admitted to Johns Hopkins Hospital, and from there transferred to a Veterans Administration Hospital, where he claims he remained for two or three weeks under observation because of this epileptic condition. He states that any sort of irritation or excitement will tend to bring on his siezures and claims that the situation in Dannemora State Hospital, namely, the presence of mentally disturbed patients there, tends to make his worse.

At the time of my examination he told me his last siezure had been approximately one week prior to the date on which I saw him, and that previous to this his last previous siezure had been in December. He believes he had about six siezures during the previous year. His siezures are usually apparently proceeded by an odor, that is to say, he gets some warning they are coming on, this

aura, the feeling of dizziness, and what he describes as seeing things before his eyes.

He tells me that he never had any type of epilepsy [fol. 33] in childhood, but he suffered from what he describes as fainting headaches. Now whether these symptoms were a manifestation of some type of epileptic form disorder in childhood I do not know at this time. He served in the United States Army from September '42 to March of 1946, and tells me he received an honorable discharge.

I asked him about his previous health, and he at first told me that he had never had any serious illnesses, but then went on to tell me that in the summer of 1946 he had a car accident in which he sustained a head injury, and told me that he was unconscious he believes for a period of four or five hours following this accident. He admitted that he had been drinking prior to the accident, and was admitted to Rochester Memorial Hospital following this accident for a period of about one week.

He also told me that he was hospitalized in the VA Hospital in Syracuse in 1957 and in 1958, as far as I was able to ascertain because of a flare-up of these epileptic attacks. He admitted that around these times he had been drinking fairily heavily, and he does seem to realize to some extent that drinking does tend to make his epilepsy worse.

He was admitted to prison in April 1959, his crime being an assault second degree, since he apparently attacked and stabbed a police officer in Rochester. And I [fol. 34] understand that his term expired on December 18, 1961. He tells me that he has only had one previous conviction. He tells me he was married in 1946 but was separated from his wife in 1951 and that there were no children by this marriage. His family history is essentially negative, and as far as he knows there is no history of epilepsy in his family.

Mr. Baxstrom's hospital record indicates that following his siezures he becomes quite confused and quite aggressive and asaultive during the post-convulsive period, and this, of course, is a not uncommon happening in cases of epilepsy. I feel that even at the time I saw him, although

he had not had a siezure for a period of one week, I felt there was still some confusion present. I felt his memory was somewhat impaired. He had difficulty in recalling some of the facts of his history, and his speech I think is somewhat slurred. In my opinion this man is suffering from epilepsy, the cause of which at the present time I do not think we can definitely pin down. But according to his history it began perhaps in 1945 whilst he was in Guam.

On inquiring further from him he informed me that he did have malaria whilst he was in Guam and he also did acquire a specific infection around that same time, and I think either of these two conditions could be causative factors in producing this epilepsy. It is my opinion that [fol. 35] he is suffering from psychosis with epilepsy. It is my opinion that there is some organic deterioration of his brain present. His record indicates that he becomes confused and is liable to have assaultive tendencies during post-convulsive periods, and it is my opinion that he certainly requires continuing care and treatment in a hospital.

Q. Doctor, when you say he has a psychosis, this is a mental illness, is it, psychosis?

A. Yes, sir.

Q. So that in your opinion then he is now mentally ill, is that true?

A. Yes, sir.

MR. LEWIS: That is all I have.

THE COURT: Mr. Baxstrom, you heard the Doctor?

MR. BAXSTROM: Yes, sir.

THE COURT: Do you have any questions to ask the Doctor?

MR. BAXSTROM: Yes, sir.

THE COURT: Now you may ask the Doctor the questions, but stick to the issues here and don't go off on any side issues or I am going to have to stop you.

MR. BAXSTROM: All right, sir.

THE COURT: All right. You may ask the Doctor any questions pertinent to the issues here.

[fol. 36] MR. BAXSTROM:

Q. Dr. Kerr, sir, did I state to you in the interview that we had, that a mental patient in Dannemora dis-

turbed me and caused commotion and irritation and caused me to have these epileptics? Sir, did I tell you that during the interview?

A. Yes, sir. As I stated, you told me that the disturbance and so forth in the hospital did tend to bring on your attacks.

Q. Yes. And I told you that they really did endanger me instead of helping me and that Dannemora State Hospital was only hurting me because of all these mental patients around?

A. You made this statement, sir, yes.

Q. Yes. And all this commotions and things like this. I also stated to you that my sisters tried to get all kind of ways to get me back to Baltimore. If I could only get back to Baltimore I could get to my own hospital. We have our own hospital insurance. And I said this Dannemora State Hospital—I'm not saying anything about the hospital, not the attendants or nothing at all—but Dannemora State Hospital is not doing me any good. I have had two attacks—

THE COURT: Limit yourself to the questions to the Doctor. Don't make a speech.

MR. BAXSTROM: Yes.

THE COURT: If you have any questions, ask the Doctor a question. Do you have any further questions [fol. 37] to ask the Doctor?

MR. BAXSTROM: No, sir, I do not, sir.

THE COURT: All right.

Q. Do you feel, Doctor, from your examination and examining the records of this man, he needs additional care? Is that correct?

A. Yes, sir. May I say something at this point, sir?

Q. Surely.

A. Since Mr. Baxstrom's sentence has actually expired, sir, I would like to say that in my opinion there is no reason why he could not be treated in a civil mental hospital. I would simply like to say that for the record, sir.

THE COURT: All right.

You understand what that means? That the Doctor feels that perhaps you—or states this. That you could be treated just as well—may I say, Doctor?

WITNESS: Yes, sir.

THE COURT: —in a civilian hospital rather than the state hospital.

MR. BAXSTROM: Yes, sir.

MR. LEWIS: May it please the Court. On behalf of the institution I would also like to add that the people at Dannemora State Hospital have absolutely no objection to a transfer of any patient to a civil institution once his [fol. 38] term has expired. It is up, however, to the Department of Mental Hygiene to determine whether or not in fact these men will be transferred, and up to the transferring institution. Or in other words, the institution to which he might be transferred. We have been able to effect such transfers in many cases and I assume his case will be given every consideration for this transfer.

THE COURT: Well, you then, Mr. Lewis, will advise the authorities what the Doctor has stated on that subject. And also, I feel that if he should be in a civilian hospital, and if it can be done under the circumstances it should be done.

MR. LEWIS: Yes, sir, I certainly will.

MR. BAXSTROM: All right. Thank you.

[Stenographer's Certificate to foregoing transcript omitted in printing.]

[fol. 39] At a Regular Term of the Supreme Court held in and for the County of Clinton at Supreme Court Chambers in the City of Plattsburgh, New York, On the 3rd day of May 1962

PRESENT: HON. MICHAEL SWEENEY, JUSTICE

* * * *

PEOPLE OF THE STATE OF NEW YORK EX REL

JOHN K. BAXSTROM, RELATOR

-against-

W. C. JOHNSTON, M.D., Director, Dannemora State Hospital, Dannemora, New York, RESPONDENT

ORDER DISMISSING WRIT OF HABEAS CORPUS—filed and entered May 8, 1962.

Upon reading and filing the Relator's Petition for a Writ of Habeas Corpus sworn to the 13th day of March, 1962 the Writ of Habeas Corpus issued thereon by the Hon. Robert G. Main, Supreme Court Justice, on the 16 day of March, 1962, and the return thereto dated the 29 day of March, 1962, and the matter having been set down for a hearing on the 3rd day of May, 1962, and the matter having been heard on the 3 day of May, 1962, and the Court having heretofore appointed Dr. Ian M. Kerr a psychiatrist, to examine and report to the Court as to the mental condition of the said Relator, and the original certificate of committment herein having been exhibited to the Court and upon all of the previous process, papers, pleadings, proceedings and testimony had and taken herein and after hearing the Relator in person in support of said Writ, and the testimony of Dr. Ian M. Kerr and Charles H. Lewis, Assistant Attorney General of the State of New York, in opposition thereto and due deliberation having been had thereon,

[fol. 40] NOW, on the motion of Louis J. Lefkowitz, Attorney General of the State of New York (Charles H.

Lewis, Assistant Attorney General, of counsel), attorney for the Respondent, it is

ORDERED, that said Writ of Habeas Corpus be and the same hereby is dismissed and the Relator be and he hereby is remanded to the custody of the Respondent at Dannemora State Hospital, Dannemora, New York.

DATED: 5/4, 1962.

ENTER:

/s/ Michael Sweeney
J. S. C.

[File Endorsement Omitted]

[fol. 41]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

State of New York
Supreme Court. Clinton County.

W-6

THE PEOPLE OF THE STATE OF NEW YORK, EX REL.

JOHNNIE K. BAXSTROM, RELATOR
vs.

DR. ROSS E. HEROLD, M.D. Acting Superintendent,
Dannemora State Hospital, Dannemora, New York
Writ of Habeas Corpus
Respondent

PETITION FOR WRIT OF HABEAS CORPUS—May 16, 1963

I Johnnie K. Baxstrom being duly sworn deposes and says that he is the above named petitution in the above action and is presently confined at the Dannemora State

Hospital as and alleged insane person after the full experation of his sentence and the above respondent of whom he is so detained by entitled matters. The petitioners detention at said hospital is by virtue of a commitment via. Attica State Prison for the conviction of the crime of assault in the second degree he was sentence out of the Monroe County Court by Hon. Clarence Henry (Judge) April 9-59 to State prison for a duration of two and one half yrs. (2½ to 3) to three the petitioner is not committed by virtue of any process or detained by law or Judge thereof nor by virtue of any final Judgement of decree [fol. 42] of a competent tribunal of Civil or Criminal Jurisdiction made in a regular or special proceeding. Therefore the purpose of this affidavit and order is to give the respondent the opportunity to show cause why the said petitioner is being confined and detained and why the said petitioner should remain in the above mentional hospital for the criminally insane where is he has fully recovered and examine by an appointed Supreme Court qualified independently establish Psychiatrist not in anyway connected with or by dept. of correction or by the dept. of the Mental Hygiene, and in the Courts 5-3-62 the independent Dr. Ivan Kerr gave his findings of the examination in which he and the Hon. Michael E. Sweeney reached this decission that the assist. Charles Lewis D.A. to transfer the petitioner to a civil institution, now if there had been any doubt in Dr. Kerr's mind or Hon. Sweeney then the petitioner is more than sure this decission would not have been made or reached. Therefore if this decission can not be act upon by Law then the petitioner's Civil rights, Veterans army rights and Constitutional rights are being defrauded and depride. The petitioner feels that he is being depride of his just liberty to society and denied promply of his freedom because of the brutal and inhuman treatment that the Dannemora State Hospital and is covered up by the D.S.H. Staff and Mental Hygiene. The petitioner is aware of his everyday surroundings and the atmosphere, comotion, irrition, brutallety, fear the aforementional hospital offers and if have too are willing to under go any mental examination by two three or more independedly Drs. not in any way connected with

the Dept. of Correction or Mental Hygiene Dept. People Ex Rel Marshall. vs. Webester 266 App. Div. 537-44. [fol. 43] 2nd, further the petitioner are presently and has full control over his so pretend mental faculties and a keen sence of the medical handling as stated before. The petitioner feels and does know that his continued confinement and detention could and would serve to prejudice his future and destroy his pride. The petitioner has his own lawyers too. Pursuant to section 1234 of the Civil Practice Act. This writ of habeas corpus is on behalf of Johnnie K. Baxstrom confined at the Dannemora State Hospital and the person of whom he is detained and confined by the aforementional Ross E. Herold the respondent. The petitioner has not been committed by any process of law held in N.Y.S. are any place in the United States.

The petitioner has not been informed of any pretence or cause for being restrained of his rightfulness and unjust liberty. The petitioner is a sane person and has served the two and one half years duration for a legal sentence therefore the illegallity of being confined and held in aforemention hospital is illegal.

The petitioner submitted a writ of habeas corpus in the Clinton County Supreme Court in the city of Plattsburgh and the Hon. Sweeney (Judge) presided that the D.A. Charles Lewis see that the petitioner be transferred to a civil institution, 5-3-62 but the Mental Hygiene Dept. Dr. Forster, Dr. Hack refuse to release the petitioner as both Staff says the petitioner is to smart for putting in Writs and the petitioner has had a brutal ruff way to go sence that writ was approved. If the [fol. 44] Mental Hygiene Dept. can as it already has over rule a Supreme Court Judge's order's and a qualified independed establish Psychiatrist then already the petitioner knows why Dannemora and the Mental Hygiene refuse to release any patient that could be helped by or discharge in good health mentally or phys to a civil institution but contunelly hold him until he looses recolection of his neutruel mind and only mostly transfer dopes thats not aware. Under the United States Constitution Federal Marshall Burke Asst. Attorney General this is kidnap-

ping and committing a Federal Crime Civilians in prison with prisoners.

The petitioner believes if the Mental Hygiene and the Staff of the aforementional hospital was rearranged then lots of the D. S. H. wouldn't be looseing their families and homes when they are aware of reality.

Case Since Civil Practice act in effect.

In general where the statement of facts in a petition for a writ of habeas corpus to inquire into the case of relators detention substantially complies with requirements of Section 1234 Subdivision 4 and 5 of the civil practice act, the petition is sufficient peo. ex. rel. Van Buren v. Superintent etc. (1922) 118 Mic. 145, 192 N.Y. Supp. 511. There it is hopeful and prayful that this writ be granted and serve a legal purpose.

/s/ Johnnie K. Baxstrom

Sworn to before me this 16 day of May, 1963.

/s/ Oren F. Henry
Notary Public

OREN F. HENRY
Notary Public in the State of New York
Residing in the County of Clinton
My Commission expires March 30, 1964

[fol. 45]

IN THE NEW YORK SUPREME COURT,
COUNTY OF CLINTON

THE PEOPLE OF THE STATE OF NEW YORK, EX REL,
JOHNNIE K. BAXSTROM, RELATOR

-against-

ROSS E. HEROLD, M.D., Director Dannemora State Hospital, Dannemora, New York, RESPONDENT

WRIT OF HABEAS CORPUS—issued June 13, 1963

THE PEOPLE OF THE STATE OF NEW YORK

TO: ROSS E. HEROLD, M.D., Director, Dannemora State Hospital.
GREETING:

WE COMMAND YOU, that you have the body of JOHNNIE K. BAXSTROM by you imprisoned and detained as it is said, together with the time and cause of said imprisonment and detention, by whatsoever name the said JOHNNIE K. BAXSTROM is called or charged, before the Honorable Harold R. Soden, Supreme Court Justice, at the Special Term of Supreme Court to be held at the Court House in the City of Plattsburgh, New York, on the 26th day of July, 1963, at 10 o'clock in the forenoon of that day, to do and receive what shall then and their be considered concerning him, and have you then and there this writ.

WITNESS: HON. HAROLD R. SODEN, Supreme Court Justice, this 13th day of June, 1963.

LET THE FOREGOING WRIT ISSUE.

/s/ Harold R. Soden
Justice of the Supreme Court

/s/ LeRoy McGee
Clerk

[SEAL]

RECEIVED
June 19, 1963
DANNEMORA STATE HOSPITAL
Medical Office

[Ad. 46]

IN THE NEW YORK SUPREME COURT
COUNTY OF CLINTON

In the Matter of the Application of
John K. Baxstrom

Return to Writ of Habeas Corpus—June 20, 1963

The following return to a Writ of Habeas Corpus heretofore granted by the Hon. Harold R. Soden, a Justice of the Supreme Court is hereby respectfull made:

I. That Ross E. Herold, M.D. is the Director of the Dannemora State Hospital, and has the care and custody of all patients committed to that institution.

II. That at a Term of the County Court, held in and for the County of Monroe, at the Court House in the City of Rochester, State of New York, on the 23rd day of April, 1959, John K. Baxstrom, the relator in the present matter was convicted of the crime of Assault 2°—Viol. Sec. 242-4 Penal Law, and was thereupon sentenced to be imprisoned in the State Prison at Attica, New York.

III. That the said relator was received at Attica Prison on April 9, 1959 and subsequently on June 1, 1961 was duly transferred to the Dannemora State Hospital, where he is now detained. That such transfer from Attica Prison to the Dannemora State Hospital was made pursuant to Law; that the order for such transfer is now in the possession of the respondent and the respondent begs leave to refer thereto upon the argument of this Writ.

IV. That the full term of sentence of said John K. Baxstrom expired on December 18, 1961 and the patient was regularly committed to this hospital on December 6, 1961 as an insane person on the Order of the Hon. Robert S. Long, Judge of the Surrogate's Court of Clinton County, in accordance with Section 384 of the Correction Law.

V. Section 384, Paragraph 3 of the Correction Law states: "Any such patient in the Dannemora State Hospital may be transferred to any appropriate state insti-

tution of the Department of Mental Hygiene or of the Department of Correction as may be designated for the custody of such patient by agreement between the heads of such departments."

[fol. 47] VI. This patient was examined by Dr. Richard V. Foster, Assistant Commissioner for the Department of Mental Hygiene on November 27, 1961 relative to a transfer to a Civil Hospital and was not considered to be suitable for care in a Civil Hospital.

VII. Deponent further alleges that the said John K. Baxstrom is, in his opinion, an insane person, and that he is in need of further hospital care and treatment.

VIII. That the said John K. Baxstrom is now presented before the Court in obedience to the Writ recently issued.

All of which is respectfully submitted.

Dated at Dannemora, New York, this 20th day of June, 1963.

/s/ Ross E. Herold
ROSS E. HEROLD, M.D.
Director, Dannemora State Hospital

[*Duly sworn to by Ross E. Herold, M.D. jurat omitted in printing (all in italics)*]

At a Term of the County Court, held in and for the County of Monroe, at the Court House in the City of Rochester, State of New York, on the 23rd day of April 1959

PRESENT:

Hon. Clarence J. Henry Monroe County Judge

The People of the State of New York.

vs.

John K. Hankerson

Indictment No. 118

Filed Mar. 21, 1958

The Defendant John K. Hankerson having been indicted by the Grand Jury of the County of Monroe, on the 21st day of November 58, for the crime of Assault, Second Degree §242-3 and 242-4 Penal Law and said indictment having been duly sent to this Court to be disposed of and said defendant upon said indictment having been duly convicted on the 19th day of March 19 59 by jury verdict of guilty of the crime of Assault, Second Degree in violation of [illegible]

and said defendant now appearing for judgment and being asked whether he have any legal cause to show why judgment should not be pronounced against him and said defendant [illegible]

It is Ordered and Adjudged by the Court that the said John K. Hankerson for the crime of Assault, Second Degree §242-4

aforesaid, whereof he has been convicted, be imprisoned in the State Prison at Attica, New York for an indeterminate term the minimum of which shall not be less than 2 1/2 years nor more than 5 years

as of April 9th, 1959

[illegible] Circuit Court, Baltimore [illegible] State of New York) on November 17, 1958 of Robbery, a felony in New York [illegible]

County of Monroe) ss: Files

I, [illegible], Clerk of said County, do hereby certify that I have compared the foregoing judgment with the original thereof remaining on record in this office and that the same is a true and correct transcript therefrom and of the whole of said original.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said County at Rochester, this [illegible] day of April A.D. 1959

[illegible] Clerk

39

[fol. 48]

39

STATE OF NEW YORK
MONROE COUNTY

County Court

THE PEOPLE OF THE STATE
OF NEW YORK

vs.

John K. Baxstrom

Judgment

April 23rd, 1959

THE PEOPLE OF THE STATE
OF NEW YORK

vs.

John K. Baxstrom

The records of County Jail show that defendant spent 110 days in said jail before sentence and is to be calculated as a part of sentence herein imposed.

Pursuant to Chapter 410 Laws of 1919.

Monroe County Sheriff

Dated April 23rd, 1959

RECD AT ATTICA PRISON

104

[fol. 50]

IN THE NEW YORK SUPREME COURT,
COUNTY OF CLINTON

THE PEOPLE OF THE STATE OF NEW YORK EX REL

JOHNNY BAXTROM, RELATOR

-against-

ROSS E. HEROLD, Superintendent, Dannemora State Hospital, Dannemora, New York, RESPONDENT

STENOGRAPHIC TRANSCRIPT of PROCEEDINGS

had in the above-titled Matter, at a Special Term of the Supreme Court held at the Clinton County Court House, Plattsburgh, New York, on Friday, July 26, 1963, before The HONORABLE HAROLD R. SODEN, Justice of the Supreme Court.

[fol. 51] APPEARANCES

LOUIS J. LEFKOWITZ, Attorney General of the State of New York; By: CHARLES H. LEWIS, Assistant Attorney General.

THE RELATOR, personally present.

* * * *

THE COURT: You are Johnny Baxtrom?
THE RELATOR: Yes, Sir.
THE COURT: What is your number?
THE RELATOR. 6887.
THE COURT: And you are the same person who heretofore has asked for a writ of habeas corpus, claiming that you are now sane and being illegally detained in an insane institution, is that true?
THE RELATOR: Yes, Sir.
THE COURT: And have you had an independent psychiatrist to examine you?
THE RELATOR: Yes, Sir.
THE COURT: Who was it?

THE RELATOR: Dr. Kerr, from Potsdam, New York.

THE COURT: Dr. Kerr?

[fol. 52] THE RELATOR: Yes, from Potsdam, New York.

THE COURT: All right, have a chair.

Mr. Lewis, this man isn't represented. Do you want to speak now as to what the contention is?

MR. LEWIS: Yes, Sir.

I'd like to bring to the attention of the Court the case of The People ex rel O'Melia against Johnston, 238 N.Y. Sup. 2nd, 999, which, in effect, states that there need not be an opportunity afforded for an independent psychiatrist to be appointed for the patient where this has been done and there is no change produced by the Relator, and that the court can rely upon the prior history as elicited from the physician, as in this case, Dr. Kerr, and that is pursuant to Section 226 of the Mental Hygiene Law.

THE COURT: Now, he has been heretofore examined by Dr. Carson; and Dr. Kerr, I take it, has stated that he [fol. 53] wasn't presently sane, is that correct?

MR. LEWIS: That is correct, Sir.

THE COURT: And that he was in need of further hospitalization?

MR. LEWIS: That is correct.

THE COURT: And that was when, did you say; did you happen to say when he was examined?

MR. LEWIS: I can find that date, I believe.

THE RELATOR: It was May the 27th, Sir, 1962.

THE COURT: May 27, 1962?

THE RELATOR: April, I'm sorry, it was April.

THE COURT: April 27, 1962?

MR. LEWIS: That's correct.

THE COURT: Now, Mr. Baxtrom, do you have any other testimony, in the way of a psychiatrist, that would disprove the statement of Dr. Kerr in 1962?

THE RELATOR: Well, Sir, I can read you my paper of the decision of Dr. Kerr, and also the Honorable Michael Sweeney.

[fol. 54] THE COURT: Well, I know, but I'm not going over the same hearing that we had in 1962 all over again.

The thing that I'm asking you, Sir, if you understand me, as there has been a doctor appointed, at your request, to examine, report and testify concerning your present mental condition at that time—

THE RELATOR: Yes, Sir.

THE COURT: Now, in a new case that has been handed down by the Appellate Division in April, 1963, if you cannot produce or have no means of producing to me at this time that there is any other psychiatric testimony that would differ from Dr. Kerr's, under the law I am bound by his statement.

Do you follow what I'm saying?

THE RELATOR: Yes, sir.

THE COURT: Do you understand it?

THE RELATOR: Yes, Sir.

THE COURT: I take it you have no further or other testimony to contradict Dr. Kerr, that is available to [fol. 55] you at the moment?

THE RELATOR: I'm not contradicting Dr. Kerr or Honorable Sweeney, but this decision was made May the 3rd, 1962, after my examination by Dr. Carson in Dannemora State Hospital.

THE COURT: Yes?

THE RELATOR: Dr. Kerr and Honorable Sweeney, on the 3rd day of May, 1962, reached this decision: That the Assistant D.A. here, Charles Lewis, transfer the petitioner, me, Johnny Baxtrom, to a civil institution. That has been approximately 15 months now, will be during the next month, and there hasn't been the first movement made yet, because I have checked, my sister has checked, my brother has checked, and there has been no—been nothing made toward these papers.

THE COURT: If course, that is an administrative procedure, isn't it, Mr. Lewis?

MR. LEWIS: Yes, Sir. It's not the decision of Judge [fol. 56] Sweeney that he be transferred; he said that he would recommend it, as he did in all the cases with these fellows over their terms.

THE COURT: Of course, I wouldn't have authority to do that.

THE RELATOR: Sir, I have a court order of that decision.

THE COURT: Well, I'm sure that Judge Sweeney didn't say that you were going to be taken from Dannemora State Hospital and put in a civil institution; he recommended it.

THE RELATOR: No, Sir, his decision, he and the independent psychiatrist, Dr. Kerr—

THE COURT: That you should be transferred to a civil hospital.

THE RELATOR: Yes, Sir.

THE COURT: And that is up to the administrative officials in the State of New York, and not the judicial branch. There isn't anything I can do about that.

THE RELATOR: No, Sir, I'm not saying anything about that, but what I'm saying is this: He asked the [fol. 57] Assistant Attorney General here to see that this be done, and Dr. Herold, Ross Herold.

THE COURT: Maybe they have, maybe they haven't, I don't know. Mr. Lewis has no power over that.

THE RELATOR: Well, he stood right there (indicating) under oath, and said that he would see that this be done, because he's having trouble out of my sister in Baltimore, Maryland, which is my home.

THE COURT: Anything further you wish to say, Mr. Lewis?

MR. LEWIS: No, Sir, nothing further, except that I believe—it's difficult to remember back in this particular case, but I'm sure that Judge Sweeney did say that he wished this man would be transferred to a civil institution, as do I, but I have no power nor has the Court.

THE COURT: The writ is respectfully entertained and denied, and you have an exception.

(Whereupon the proceedings in the above-titled action [fol. 58] were concluded).

* * * *

[Stenographer's Certificate to foregoing transcript omitted in printing.]

[fol. 59] At a Special Term of Supreme Court held in and for the County of Clinton at the Court House in the City of Plattsburgh on the 26th day of July, 1963.

PRESENT: HON. HAROLD R. SODEN, JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF CLINTON

Criminal # 58

THE PEOPLE OF THE STATE OF NEW YORK EX REL

JOHNNIE K. BAXTROM, RELATOR

-against-

ROSS E. HEROLD, Director, Dannemora State Hospital, Dannemora, New York, RESPONDENT

ORDER DISMISSING WRIT OF HABEAS CORPUS—dated August 2, 1963

Upon reading and filing the Relator's Petition for a Writ of Habeas Corpus dated May 16, 1963 the Writ of Habeas Corpus issued thereon by this Court dated June 13, 1963 the Return thereto dated June 20, 1963 and the matter originally having been scheduled for July 26, 1963 upon which day it was heard, and the original certificate of committment herein having been exhibited to the Court and upon all of the previous papers, process, pleadings, proceedings and testimony had and taken herein, and after hearing the Relator in person in support of said Writ and Charles H. Lewis, an Assistant Attorney General of the State of New York, in opposition thereto, and due deliberation having been had thereon.

[fol. 60] Now, on the motion of Louis J. Lefkowitz, Attorney General of the State of New York, (Charles H. Lewis, Assistant Attorney General, of counsel), attorney for Respondent, it is

ORDERED that said Writ of Habeas Corpus be and the same hereby is dismissed and the Relator, JOHNNIE K.

BAXTROM, be and he hereby is remanded to the custody of the Respondent at the Dannemora State Hospital, Dannemora, New York.

DATED: AUGUST 2, 1963.

ENTER:

/s/ Harold R. Soden
Justice of the Supreme Court

[File Endorsement omitted]

[fol. 61] At a Term of the Appellate Division of The Supreme Court, State of New York, held in and for the Third Judicial Department, at the County Court House in the City of Albany, New York, commencing on the 20th day of April, 1964.

PRESENT:

HON. JAMES GIBSON,
Justice Presiding,
HON. J. CLARENCE HERLIHY,
HON. DONALD S. TAYLOR,
HON. FELIX J. AULISI,
HON. HERBERT D. HAMM,
Associate Justices.

Criminal Index # 58

Order No. 5682

THE PEOPLE OF THE STATE OF NEW YORK EX REL.

JOHNNIE K. BAXSTROM, APPELLANT

-against-

ROSS E. HEROLD, as Director of Dannemora State Hospital, RESPONDENT

The appeal from an order denying relator's petition for a writ of *habeas corpus* having been duly brought before

this Court during the April, 1964 Term thereof and having been duly submitted by appellant and by Louis J. Lefkowitz, Attorney General of the State of New York (Anthony J. Lokot of counsel), attorney for respondent, and due deliberation having been had, and a decision having been handed down on May 22, 1964, it is

ORDERED, that the order as appealed from be and the same is hereby unanimously affirmed, without costs. No opinion.

/s/ John J. O'Brien
Clerk

[SEAL]

ENTERED: July 15, 1964

A TRUE COPY

/s/ John J. O'Brien
Clerk

FILED
July 21, 1964
CLINTON COUNTY
CLERK'S OFFICE
HALSEY J. STARK, Clerk

[fol. 62]

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighth day of October A.D. 1964.

PRESENT, HON. CHARLES S. DESMOND, *Chief judge, presiding.*

Mo. No. 693

THE PEOPLE &c. EX REL. JOHNNIE K. BAXSTROM, APPELLANT

vs.

DR. ROSS E. HEROLD, Director, Dannemora State Hospital, Dannemora, New York, RESPONDENT

A motion for leave to appeal to the Court of Appeals &c. in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

* * * *

[fol. 63]

SUPREME COURT OF THE UNITED STATES

No. 838 Misc., October Term, 1964

JOHNNIE K. BAXSTROM, PETITIONER

v.

R. E. HEROLD, Director, Dannemora State Hospital

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 7, 1965

On petition for writ of Certiorari to the Court of Appeals of the State of New Yorkk.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1246 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 787145 189

PETITION NOT PRINTED
RESPONSE NOT PRINTED

FILED
NOV 1 2 1965
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 219

JOHNNIE K. BAXSTROM,

Petitioner,

vs.

R. E. HEROLD, Director, Dannemora State Hospital,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AND APPENDIX FOR PETITIONER

LEON B. POLSKY
The Legal Aid Society
Counsel for Petitioner
100 Centre Street
New York City, New York

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 219

JOHNNIE K. BAXSTROM,

Petitioner,

vs.

R. E. HEROLD, Director, Dannemora State Hospital,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

Opinions Below

No opinions were rendered by the courts below.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3). The writ of certiorari to the New York Court of Appeals was granted on June 7, 1965.

Constitutional Provisions and Statutes Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 375, 383, 384 and 385 of the New York Correction Law. These provisions are reprinted as Appendix E, *infra.*

Questions Presented

I

Whether due process of law requires a proposed patient be afforded the opportunity to obtain counsel to represent him at an insanity commitment hearing and whether the due process and equal protection clauses require the assignment of counsel to represent an unrepresented proposed patient in such a proceeding.

II

Whether a state which affords all proposed civil patients a jury trial upon the question of sanity may withhold this right from felons whose commitment is sought upon the expiration of sentence.

III

Whether a state may confine one class of civil patients in an institution for the criminally insane without a particularized showing of need for such care and custody.

Statement of the Case

Petitioner was convicted in Rochester, New York, of Assault in the Second Degree and, on April 23, 1959, was sentenced to two and one-half to three years imprisonment (R. 39). After serving two years and several months in Attica State Prison, the Petitioner was "transferred" to Dannemora State Hospital pursuant to Section 383 of the Correction Law (R. 17).

The Commitment

In November 1961, the Director of Dannemora State Hospital filed a petition in the Surrogates' Court of Clinton County stating that Petitioner's penal sentence was about to terminate and requesting the certification and commitment of the Petitioner pursuant to Section 384 of the Correction Law, alleging:

> "This patient was admitted here on June 1, 1961 from Attica Prison. He is suffering from epilepsy and when having fits, he is violent and dangerous. He has had several epileptic seizures since his admission and he is still in need of medication and hospitalization. His diagnosis is Psychosis due to convulsive disorder, Epileptic Deterioration" (R. 2).

Annexed to the Petition was the joint certificate of two doctors, unconnected with Dannemora stating that Mr. Baxstrom lacked insight, "possibly" had a "tendency" to injure others (R. 5) and that following his epileptic convulsions he was "irritable, confused [and] aggressive" (R. 4).

Notice that a commitment proceeding was to be held on December 6, 1961 was served upon two relatives of the Petitioner who lived in Maryland (R. 8, 9) and upon the Petitioner himself (R. 10). It does not appear that the Petitioner or his relatives were served with a copy of the Director's application for commitment.

On December 6, 1961 Baxstrom appeared before the Surrogate of Clinton County. Present were Surrogate Long, Doctor Ross Herold, then the Assistant Director of Dannemora, and Assistant Attorney General Lewis.

The Court advised Mr. Baxstrom that it had read the certificates of the two independent doctors and that they were of the opinion that he was still mentally ill. The Court advised that it would hear the testimony of Dr. Herold and then would allow Baxstrom to question either the doctor, Mr. Lewis or make any statement he cared to regarding the matter. Mr. Lewis then interrogated Dr. Herold, eliciting the doctor's qualifications and the opinion that the Petitioner was mentally ill and in need of institutional care with a diagnosis of psychosis due to epileptic deterioration (R. 15-16). In response to questions from the Court, Dr. Herold stated that he would have no objection to the Petitioner's transfer to a civil hospital if the Department of Mental Hygiene ordered it. The Court stated that it too had no objection to a transfer to a civil hospital and told Baxstrom that it hoped he would be transferred (R. 17, 18).

Mr. Baxstrom was asked by Surrogate Long whether he had anything to say and the Petitioner replied:

> "I know that I am an epileptic, but I did not think that that is a form of insanity. I would like to recommend, Sir, that the staff at the hospital review my case" (R. 17).

At no point in the hearing was the Petitioner advised that he could be represented by counsel, either retained or assigned, or that he might subpoena or call witnesses on his own behalf.

On December 6th, Surrogate Long signed an order committing the Petitioner to the custody of the Commissioner of Mental Hygiene,

"... to be placed in an appropriate state institution of the Department of Mental Hygiene or of the Department of Correction as may be designated for the custody of such person by agreement between the heads of the two departments" (R. 12).

The First Writ

Four months after this commitment the Petitioner sued out a writ of habeas corpus in Supreme Court, Clinton County (R. 19-32). The Director's Return on the Writ recited the history of the prior proceedings and stated that Petitioner was then insane and had been examined on November 27, 1961 by an Assistant Commissioner for the Department of Mental Hygiene and "was not considered to be suitable for care in a Civil Hospital" (R. 21). At a preliminary hearing on the Writ, Justice Sweeney directed Petitioner be examined by an independent psychiatrist and the hearing was adjourned. On May 3, 1962 a hearing was held before Justice Sweeney.

Dr. Ian Kerr testified that he had examined the Petitioner and found him suffering from psychosis with epilepsy and was of the opinion that there was some organic deterioration of the brain. He testified that according to the hospital records, Mr. Baxstrom,

"... becomes quite confused and quite aggressive and assaultive during the post-convulsive period, and this, of course, is not an uncommon happening in cases of epilepsy" (R. 27).

The doctor found that the Petitioner's epilepsy could have been caused either by malaria or a specific infection con-

tracted by Petitioner in 1945 while in the Army and stationed in the Pacific (R. 28).

The doctor also related, but did not comment on the fact that Mr. Baxstrom had told him during the examination that the disturbances and irritations caused by the other inmates at Dannemora tended to bring on the epileptic attacks (R. 26, 28-29).

At the conclusion of the hearing the doctor, in response to a question by the Court, stated that Mr. Baxstrom needed additional care but added,

> " . . . I would like to say that in my opinion there is no reason why he could not be treated in a civil mental hospital. I would simply like to say that for the record, sir" (R. 29).

Assistant Attorney General Lewis then stated,

> "On behalf of the institution I would like to add that the people at Dannemora State Hospital have absolutely no objection to the transfer of any patient to a civil hospital once his term has expired. It is up, however, to the Department of Mental Hygiene to determine whether or not in fact these men will be transferred • • • " (R. 30).

The hearing concluded with the Court's direction to Mr. Lewis that the authorities be advised of Dr. Kerr's recommendation in which the Court joined (R. 30).

On the following day (May 4, 1962), Judge Sweeney signed the order dismissing the Writ (R. 31-32).

The Proceedings Below

On May 16, 1963, one year after the dismissal by Judge Sweeney, Petitioner submitted to the Supreme Court of Clinton County an application for a new writ of habeas corpus claiming that he was then sane, or if insane should be transferred to a civil mental hospital and that his civil and constitutional rights had been violated. The Writ was issued and the Respondent, Dr. Herold, filed his return reciting the December 6, 1961 commitment, that Petitioner was still insane and in need of further hospital care and treatment and that Mr. Baxstrom had been examined on November 27, 1961 by an Assistant Commissioner of the Department of Mental Hygiene and "was not considered to be suitable for care in a Civil Hospital" (R. 38).

A hearing was held before Justice Harold Soden on July 26, 1963. At the hearing Assistant Attorney General Lewis opposed the appointment of a new independent psychiatrist claiming that the burden was on Petitioner to show that his condition had changed since Dr. Kerr's testimony that Petitioner was in need of hospitalization and that until Petitioner made such a showing the Court could rely upon Dr. Kerr's testimony on the prior Writ. Justice Soden asked Petitioner,

> " . . . do you have any other testimony, in the way of a psychiatrist, that would disprove the statements of Dr. Kerr in 1962?"
>
> • • • • •
>
> " . . . if you cannot produce or have no means of producing to me at this time that there is any other psychiatric testimony that would differ from Dr. Kerr's, under the law I am bound by his statement" (R. 42, 43).

Petitioner indicated he had no additional testimony but claimed that Judge Sweeney, after hearing Dr. Kerr, had directed Mr. Lewis to have Petitioner transferred to a civil institution and that nothing had been done. Judge Soden said that this was an administrative matter and that there was nothing his court could do about it. The Writ was dismissed by order dated August 2, 1963 (R. 45-46).

Upon appeal to the Appellate Division of the Supreme Court, Third Judicial Department, the dismissal of the Writ was affirmed without opinion (21 A. D. 2d 754). A motion for leave to appeal to the Court of Appeals was denied without opinion (14 N. Y. 2d 490) and this Court granted leave to proceed *in forma pauperis* and the petition for a Writ of Certiorari (381 U. S. 949).

Introduction

New York State maintains twenty-one non-transient institutions for the care of the mentally ill. These institutions are under the exclusive jurisdiction of the Department of Mental Hygiene and commitment to and matters connected with these hospitals are regulated by the Mental Hygiene Law. In addition the State maintains two other institutions: Matteawan State Hospital and Dannemora State Hospital. These institutions are under the jurisdiction of the Department of Correction, although individual patients may be in the custody of the Commissioner of Mental Hygiene. See, *Mental Hygiene Law*, §11. Admission to these institutions is governed by various sections of the Correction Law, the Code of Criminal Procedure and the Mental Hygiene Law set forth below.

Dannemora State Hospital

Dannemora is a State hospital for the insane maintained at a penal institution.[1] It is under the jurisdiction and control of the Department of Correction, subject to visitation and inspection by the Department of Mental Hygiene. *Correction Law,* §375. Its population is composed of three classes of individuals:

1. Male persons, in the custody of the Commissioner of Corrections, who were found to be insane while serving felony sentences and were committed or transferred pursuant to Section 383 of the Correction Law.

2. Male persons, in the custody of the Commissioner of Corrections, who after having been adjudicated to be a juvenile delinquent or having been convicted of any crime were found, while serving their sentences, to be "mental defectives" and transferred to the Eastern Correctional Institute and while there were found to be insane. *Correction Law,* §383 (see N. Y. Legislative Annual, 1950, p. 51).

3. Male persons transferred to Dannemora under either of the above classifications who upon expiration of sentence were committed to the custody of the Commissioner of Mental Hygiene under *Correction Law,* §384.

Matteawan State Hospital

Like Dannemora, Matteawan is a mental institution under the jurisdiction and control of the Department of Correction and subject to visitation and inspection by the Department

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[1] *People ex rel. Brown* v. *Johnston,* 9 N. Y. 2d 482 at 484 (1961); *People ex rel. Kamisaroff* v. *Johnston,* 13 N. Y. 2d 66, 68 (1963).

of Mental Hygiene. Basically its purpose is to hold in custody and care for persons committed by other than civil process and certain civilly committed patients. *Correction Law,* §400. Its population is composed of five classes of persons:

1. Persons charged with crime who have been judicially found to be mentally incapable of standing trial (*Code of Criminal Procedure,* §§662(b), 872 and 875). Prior to September 1, 1965 such persons were committed to the custody of the Commissioner of Corrections. All commitments after that date were to the Commissioner of Mental Hygiene. Laws of 1965, c. 540, §§1, 2, 3.

2. Persons declared insane while serving a misdemeanor sentence or females declared insane while serving any sentence. *Correction Law,* §§400, 408.

3. Persons acquitted by reason of insanity. *Code of Criminal Procedure,* §454.

4. Persons who had previously been committed by civil process to a state mental hospital and while there have committed or are liable to commit acts which would constitute homicide or felonious assault; or a person so dangerously mentally ill that he is a danger to other inmates, officers of the hospital or the community. *Mental Hygiene Law,* §85.

5. Persons who were committed by civil process to a state mental hospital and who (1) had previously been sentenced to imprisonment and (2) still manifest criminal tendencies. Laws of 1904, c. 525, §2 (*Correction Law,* §412). This law was repealed by Laws of 1965, c. 105, §11; however, there apparently is no provision for the transfer out of those inmates previously committed.

Under New York law, both at the time of Petitioner's commitment and at present, all defendants in non-emergency commitment proceedings instituted under the Mental Hygiene Law were at some point in the proceeding entitled to a jury trial on the issue of sanity. Laws of 1961, c. 504 as amended by Laws of 1964, c. 738, §6 (*infra*, p. 67). This provision is inapplicable to commitments to Dannemora State Hospital under *Correction Law*, §384 and to the transfers, listed above, of persons otherwise in custody to Dannemora and Matteawan. See *People ex rel. Kamisaroff* v. *Johnston*, 13 N. Y. 2d 66 (1963).

POINT I

The commitment and continued detention of petitioner are in violation of his rights under the Fourteenth Amendment because of the failure to afford petitioner counsel at the hearing upon his sanity.

A. *The General Need for Counsel*

It is perhaps assumed that counsel at commitment proceedings can perform no real function at the hearing, or at best, will perform only the therapeutic function of demonstrating to a patient that there was someone who is on his side. This assumption is based upon the further assumption that commitment proceedings, upon doctor's certificates of insanity, are instituted only against the "obviously mad" and there is nothing further to be done except go through the formal gesture of getting some evidence upon the record and signing a commitment order. Both assumptions are demonstrably false.

Random samplings of Legal Aid and Public Defender offices throughout the country dramatically illustrate how

defendants in commitment proceedings have successfully resisted commitment in almost 20% of the cases where counsel was assigned (see, Appendix B). Furthermore just as representation of a guilty defendant at sentence is required so that the court may make a just disposition of a criminal defendant (cf., *Carter* v. *Illinois*, 329 U. S. 173, 178), so is representation at commitment of concededly insane persons required to enable the court to arrive at a just and proper commitment. Even if it may be assumed that there is no legal difference between commitment to one state mental institution or another, certainly there exist factual differences between certain institutions (see p. 23, *infra*) and counsel may perform the necessary and legitimate function of having the commitment reflect the need for a particular type of institutionalization or even out-patient care without confinement. This need is best reflected by the annexed report (Appendix C) of the Public Defender of Philadelphia who represents felony prisoners in post-sentence expiry commitment proceedings.[2]

This need for counsel has been confirmed by the legislatures of an overwhelming majority of the states by their enactment of statutes providing for representation at commitment hearings—in some cases the statutes even antedating the state's guarantee of counsel in non-capital felony cases (see Appendix A).

In the State of Ohio, Governor Di Salle reported in 1961 (Appendix D, p. 61, *infra*) that 25% of the patients in

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[2] This representation is financed by a grant from the National Legal Aid and Defender Association. It does not extend to representation of defendants in ordinary civil commitments. No provision is made for the representation of such persons in Pennsylvania. (See Appendix A, p. 38 *infra*.)

his state's mental hospitals were persons over 65 years and that approximately one-half of these patients were not mentally ill in the commonly accepted sense. He stated that after his investigation 1,500 such patients were discharged and that the total discharges might reach 3,000. One may well wonder how these 3,000 persons initially came to be committed and how long they would have remained in the asylums had not the Governor intervened in their behalf. We do not know how many of these persons had counsel at their commitments nor do we know how many of those persons with counsel who successfully resisted commitment would have been committed if unrepresented.[3] We offer these figures only to show that a substantial number of legally sane persons are in fact committed and that an even more substantial number find themselves as defendants in commitment proceedings.

Apart from all this, however, the need for counsel in this type of proceeding is an obvious truth needing no documentation. Putting aside the rare case of malicious commitment there will always be some kernel of truth to a claim that a particular respondent or defendant is "not normal." The issue in almost every contested commitment is how close does the proposed patient come to the elusive line which divides the sane from the committable. Such a person, even if falling upon the "sane" side of the scale, is probably the one least capable of asserting his sanity. Cer-

[3] Assignment of counsel in Ohio is discretionary. We are advised by the Legal Aid Society of Cincinnati that it appears "in very few commitment cases"; the Defender's Office of the Cleveland Legal Aid Society handled five civil commitment cases in the first nine months of this year and the Legal Aid and Defender Society of Columbus appeared in ten such proceedings during this period. Of the fifteen persons represented by assigned counsel in Cleveland and Columbus, eight were committed, six were not and one escaped before disposition.

tainly such a person is no match for an Assistant Attorney General who has probably handled hundreds of commitment proceedings and such a person could hardly be expected to effectively cross-examine a court-wise director of a large mental institution or to cross-examine absent certifying doctors.

We may allow New York to continue its uniform policy of non-assignment of counsel only if we are prepared to assume the infallibility of the certifying doctors[4] and that the judicial process is merely a rubber stamp upon the ineffectually contested opinions of expert witnesses. Such assumption may be validly made only if the defendant's sanity may be conclusively presumed from the mere fact that a commitment proceeding was instituted. Such assumptions and presumptions run counter to a thousand years of history.

B. *Petitioner's Need for Counsel*

The proceedings had before the Surrogate of Clinton County clearly reflect the need for counsel, both as to the question of Petitioner's sanity and the disposition to be made.

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[4] The notion that "insanity" is a determination solely for the doctors rests upon the false premise that mental illness may be scientifically measured and that the experts proceed upon uniform, precise standards which result in opinions equivalent in accuracy to the opinions of fingerprint experts. We need only look at the conflicting expert testimony in any criminal case where insanity is tendered as a defense to see the fallacy of this argument.

The basic question in commitment proceedings is not whether a patient is insane (whatever that may mean) but is whether a person's mental capacity is such that his continued liberty is a potential danger to himself or the community. This is not a medical judgment. It is a social judgment based upon contemporary community standards of what is or is not acceptable conduct. See, *Is Counsel Needed at Commitment Hearings?—A Symposium*, 23 Legal Aid Briefcase 13-18 (Oct. 1964).

New York law (Correction Law, §384) requires that the certification be upon the certificates of two doctors unconnected with the hospital. The certificates filed at the commitment proceeding before the Surrogate reflected that Mr. Baxstrom, as a "psychiatric sign and symptom", lacked insight (R. 5, l. 108); that following his epileptic seizures, he was "irritable, confused, [and] aggressive" (R. 4, l. 104) and that he "possibly" showed a "tendency" to injure others (R. 5, l. 115).

This diagnosis and prognosis of Mr. Baxstrom's illness is equally applicable to the two million epileptics in the United States. Whether cross-examination of the certifying doctors would have shown the Petitioner "insane" or "sane" is a matter for conjecture. The fact remains that the doctors were not even present and there was no one in court who could have demanded their presence on Petitioner's behalf.[5] In this connection it is noteworthy that Dr. Kerr, the psychiatrist who examined Petitioner five months after the commitment, volunteered in his testimony at the first post-commitment habeas corpus hearing, that "there is no reason why he could not be treated in a civil mental hospital" (R. 29). Presumably such testimony was related to Petitioner's alleged tendency to be possibly dangerous and is in direct conflict with the assumed administrative finding by the Assistant Commissioner of Mental Hygiene that the Petitioner "was not suitable" for transfer to a civil hospital.

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[5] See, *State ex rel. Anderson* v. *U. S. Veterans Hospital*, 268 Minn. 213, 128 N. W. 2d 710 (1964); *Denton* v. *Commonwealth*, 383 S. W. 2d 681 (Ky., 1964) holding the reliance upon the certificates of the absent doctors and the failure to allow for their cross-examination to be a denial of due process. *Cf.*, *Pointer* v. *Texas*, 380 U. S. 163 (1965).

Even if the Petitioner were in fact insane the Surrogate, who concluded the hearing with the hope that Petitioner would be transferred to a civil hospital, could have refused to commit the Petitioner under Section 384 and required the State to proceed under the Mental Hygiene Law rather than the Correction Law. If such a procedure had been followed then the Petitioner at such a commitment proceeding would have been entitled to a jury trial on the question of his sanity and if committed could have been sent only to the civil hospital where everyone, except the Commissioner of Mental Hygiene, seemed to agree he belonged.[6]

C. *The Right to Counsel*

Every jurisdiction provides for some form of hearing and judicial review or determination of the sanity of those patients who wish to contest their commitment.[7] The right to a hearing and the opportunity to be heard in a meaningful manner is a fundamental requirement of due process whether the case be civil, criminal or somewhere in between. *Armstrong* v. *Manzo*, 380 U. S. 545 (1965). Without counsel to implement this right the commitment hearing becomes nothing more than a hollow gesture and the luck-

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[6] If the Petitioner had been so committed he could be transferred to Matteawan only upon showing that in addition to being insane, there was a particular danger to others if he was allowed to remain in a civil hospital. *Mental Hygiene Law*, §85; *Correction Law*, §412 (repealed). See Point III, *infra*.

[7] We cannot help but note that in many jurisdictions this right is an illusory one for it depends upon someone, usually the doctors, advising a patient of his rights. See, Hearings before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, *Constitutional Rights of the Mentally Ill*, Part I, Eighty-seventh Congress, First Session (1961) (hereafter *Senate Hearings*), Ross testimony, p. 185; Guttmacher testimony, p. 148; Chasan testimony, p. 228.

less defendant is packed away to custody "probably little less punitive than a sentence of death." *Ex parte Perry,* 137 N. J. Equity 161, 43 A. 2d 885, 886 (1945).

It is one of the great anomalies of constitutional law that the arguments for the absolute right to counsel in criminal cases reach back for historic support to the much older right to counsel in civil litigations. Thus both Justice Blackstone (4 Blackstone, *Commentaries,* *355) and this Court in *Powell* v. *Alabama,* 287 U. S. 45 (1932), relied upon the common law tradition of civil representation to support the claimed right to assignment in criminal cases.

As Professor Maguire has pointed out the Year Books and the reports of the Selden Society are replete with notations of the granting of *in forma pauperis* type relief and the assignment of counsel to represent indigent civil litigants in the Fourteenth and early Fifteenth Centuries. Maguire, *Poverty and Civil Litigation,* 36 Harv. L. Rev. 361 (1923).

In 1495 the first extensive *forma pauperis* statute was passed. 11 Hen. VII, c. 12; 2 Stat. of the Realm, 578. It provided:

> ". . . every pouer persone or persones which have & hereafter shall have cause of accion or accions ayenst any persone or persones within the realme shall have, by the discrecion of the Chauncellor of this realme, for the tyme being writte or writtes originall and writtes of Sub pena according to the nature of their causes, therfor nothing paieng to youre Highnes for the seales of the same, nor to any persone for the making of the same writte & writtes to be hereafter used. And that the seid Chaunceller for the same tyme being shall assigne suche of the Clerkis whiche shall doo and use

> the making and writing of the same writtes to write the same redy to be sealed, and also lerned Councell and attorneyes for the same, without any rewarde taking therfor . . . "

See also, 3 Blackstone *400-401.

The right to counsel in commitment proceedings is even more fundamental than the general right to counsel in other civil litigation.[8] As this Court noted in *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, at 276-77:

> "We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and impartial in appearance' may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings."

The argument will undoubtedly be advanced that the State was acting for the benefit of Petitioner and other members of the community by placing him in a mental institution. Such a contention really only relates to the Government's

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[8] Louisiana has made just such a distinction, but in reverse. In a proceeding to appoint an administrator of the property of a person alleged to be incapable of managing his affairs, the Supreme Court of Louisiana held that any judgment was void if counsel was not appointed. *Interdiction of Scurto*, 195 La. 747, 197 So. 417. However, eight years later the same court held that notice and hearing was not required in a commitment. *In Re Bryant*, 214 La. 573, 38 So. 2d 248 (1948). We reject as intolerable the distinction which gives greater value to property rights than to liberty.

power to commit, not to the means by which the commitment is effectuated. The observation by Mr. Justice Brandeis that, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent"[9] is particularly appropriate here. At all of his hearings the Petitioner received sympathetic attention from the judges presiding and the other persons present. Concededly the State was acting out of motives which generally may be classified as parental or charitable. But this sympathy, courtesy and good intentions relate to the therapeutic aspect of the hearing and commitment, not to the legal question of whether an individual is committable. This question is to be ultimately resolved in the same manner as are all other questions involving the liberty and property rights of persons. Whether the Petitioner's conduct and condition fell outside those minimum standards of mental responsibility tolerable to society can be determined with sympathy and understanding, but also with justice.

The State of New York has labeled this commitment a "civil" proceeding and because of this characterization, denies Petitioner an attorney.[10] We think the accuracy of this label is debatable in all civil commitments to any mental institutions; however, in terms of a commitment to Dannemora, the civil tag is utterly without basis. At Dannemora the Petitioner is mingled with convicted felons

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[9] *Olmstead* v. *United States*, 277 U. S. 438, 479 (dissenting opinion).

[10] The New York Attorney General, two months prior to Petitioner's commitment, responded to an enquiry from one of the judges of Clinton County that a Section 384 commitment is a civil proceeding and, ". . . it is not necessary to so advise an inmate [of his right to retain counsel] but if that inmate indicates that he desires counsel an opportunity should be given to him to hire counsel." 1961 Op. Atty. Gen. N. Y. 180, 181.

serving out their sentence in a hospital located upon prison grounds and operated under prison discipline. And by virtue of his custody in Dannemora Petitioner must bear a stigma even more onerous than that of a criminal prisoner. *People ex rel. Brown* v. *Johnson,* 9 N. Y. 2d 482. All that has happened to justify the civil label is that one day the Petitioner was taken from Dannemora and brought before a judge who returned him from whence he came, although now in some abstract sense, in the custody of the Commissioner of Mental Hygiene.

Fundamental fairness as an aspect of due process of law is not limited to proceedings strictly called criminal. *Smith* v. *Bennett,* 365 U. S. 708 (1961); *cf., One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 393 (1965).

Those criminal cases involving the right to counsel which rest upon a fundamental fairness test are ample authority for the proposition that the due process requirement of a fair hearing in civil proceedings includes the right to appear by counsel and to have counsel appointed in cases where personal liberty is at stake.

POINT II

Section 384 of the Correction Law is unconstitutional in that it arbitrarily singles out one group of allegedly mentally ill persons and denies to that group the jury trial to which all other civilly committed patients are entitled.

Under New York law[11] all proposed civil patients are entitled to a jury review of the question of their sanity. Only persons who allegedly became insane and whose insanity was discovered during service of a criminal sentence are refused a jury trial on this question. While New York may be under no constitutional obligation to provide a jury trial in any of its civil commitments, having made it generally available to all it may not arbitrarily withhold it from some. Each year New York admits approximately 30,000 persons to its civil mental hospitals.[12] However only the 487 inmates in Dannemora who are held under Section 384 commitments are never given the opportunity to demand the jury trial which all other civil patients could demand incident to their commitment.

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[11] Jury trials existed in pre-Revolutionary New York for the purpose of "informing the conscience of the court." By Chapter 135 of the Laws of 1842 a jury review was made a matter of right in every civil commitment proceeding. *Sporza* v. *German Savings Bank*, 192 N. Y. 8 (1908). The substance of this statute has remained unchanged and at the time of Petitioner's commitment appeared in Laws of 1961, c. 504 (McKinney's *Mental Hygiene Law*, §76). At present the jury trial provision is a part of the Laws of 1964, c. 738, §6 (McKinney's *Mental Hygiene Law*, §74). See Appendix E, p. 67 *infra*.

[12] This figure includes temporary commitments, voluntary patients, involuntary patients and transfers. *Patients in Mental Institutions*, 1963, Public Health Svc. Pub. No. 1222, Part II, p. II-17.

The sole factor which distinguishes Petitioner from the other civil patients for whom a jury trial is available is that Petitioner's commitment follows the expiration of a criminal sentence and an administrative determination of insanity made during the service of that sentence. Neither of these factors is sufficient to warrant the discriminatory treatment afforded.

Clearly New York could not withhold a jury trial on the issue of sanity only from ex-felons for that status bares no rational relationship to the question of sanity. *Walters* v. *City of St. Louis,* 347 U. S. 231, 237 (1954); *Goesaert* v. *Cleary,* 335 U. S. 464, 466 (1948). Indeed New York seems to have recognized this by not even including past criminal convictions in any of the stated criteria for the transfer of committed patients to Matteawan.[13]

The fact that there has been prior administrative determination that Petitioner was insane stands upon an even more tenuous footing as a basis for denying a jury trial. In every case where a jury trial is available there has been not only an administrative determination of insanity but there has also been a judicial determination. The New York jury trial is a *de novo* rehearing of a judicial certification of insanity, in most cases involving patients already being held by a mental hospital on a temporary or informal admission.

While we concede that there may be a legitimate basis for distinguishing between the "civilly insane" and the

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[13] Under former Section 412 of the Correction Law a prior conviction *plus* manifestation of criminal tendencies would warrant a transfer of a civil patient to Matteawan. This Section was repealed in 1965. See, *United States ex rel. Carroll* v. *McNeil,* 294 F. 2d 117 (2nd Cir., 1961), probable jurisdiction noted, 368 U. S. 951, vacated and dismissed as moot, 369 U. S. 149 (1962).

"criminally insane" in determining the type of custodial or medical care to be ultimately given, no such distinction can be drawn when we are considering the procedure whereby the fact in issue, the sanity of the proposed patient, is to be determined.

POINT III

Petitioner's commitment and retention in Dannemora State Hospital under Section 384 of the Correction Law violates the equal protection and due process clauses of the Constitution in that the statute arbitrarily singles out one group of mentally ill persons and permits their confinement in an institution for the criminally insane without the necessity of a judicial finding that such confinement is necessary.

Dannemore State Hospital is an institution maintained by the Department of Correction of the State of New York on the grounds of Clinton State Prison. Over one-half its inmates are prisoners serving felony sentences.[14] While in Dannemora the Petitioner is subject to the prison discipline which applies to all inmates whether serving a sentence or not. Even the social amenities granted to inmates in civil hospitals are denied to Petitioner. He may not wear his own clothes; he may not correspond freely with friends or persons not approved by the Commissioner of Correction (*Correction Law,* Section 388); his visitors must be fingerprinted; and the prison number (#6887) given to Petitioner upon his transfer into Dannemora as a prisoner

[14] As of September 1965 the population of Dannemora was:

1.	Held under section 383	560
2.	Held under section 384	487
3.	Transfers from Eastern Corr. Inst.	13

remains his number which must appear upon all his correspondence as a civil patient. If the Petitioner is no longer a "prisoner" in Dannemora the State has done little to make Petitioner aware of this fact. Indeed the Legislature of the State of New York has by deliberate act set Dannemora and Matteawan apart from all other mental hospitals in the state system. See, *United States ex rel. Carroll* v. *McNeil,* 294 F. 2d 117 (2nd Cir.), probable jurisdiction noted, 368 U. S. 951, appeal dismissed as moot, 369 U. S. 149 (1962). It has done this by placing these institutions under the jurisdiction of the Department of Correction and, in the act creating Dannemora designated it as a place "... used for the purpose of confining and caring for such male prisoners as are declared insane while confined in a state prison ..." (Correction Law, Section 375).

We have acknowledged that a state may discriminate in the kinds of care and custody afforded to individual inmates. Particularly, a state may segregate within its hospital system those persons whose mental illness poses an especial danger to the hospital staff, fellow patients, or to the person's own well being and safety. However the State has, in the instance of Section 384 patients, gone too far.

Not only has New York provided for confinement outside of its hospital system but it has done so at the expense of the procedural safeguards discussed in Point II and without establishing any criteria or standards which would distinguish Petitioner's class from other proposed civil patients.

Under New York law only three classes of civil patients are amenable to confinement in the institutions maintained by the Department of Correction: (1) the patient already

committed by civil process to a civil hospital who after a separate judicial proceeding is found to be homicidal or liable to commit acts which would constitute felonious assault or who is so mentally ill that he is a danger to others (*Mental Hygiene Law,* Section 85); (2) those patients already committed by civil process who are ex-felons and who continue to exhibit criminal propensities (former *Correction Law,* Section 412; see, *United States ex rel. Carroll* v. *McNeil, supra,* holding part of this statute to be unconstitutional); and lastly, those persons situated as was Petitioner.[15]

In each instance where the transfer of a civil patient to an institution of the Department of Correction is sought, the State has the burden of showing that the inmate, in addition to his insanity, belongs to a class of mentally ill persons for whom stricter security is necessary. However when the post sentence expiry commitment of a Dannemora prisoner is sought, no finding need be made other than that the prisoner-patient is insane. It even appears that a Section 384 commitment may be made in spite of the fact that the evidence adduced shows " . . . there was no reason why [Petitioner] could not be treated in a civil hospital" (*supra,* p. 6).

The statute under which the Petitioner was committed and is confined sets him apart from all other civil patients in both a physical sense and a procedural sense. Because of this classification which is neither rationally based nor uniformly applied, Petitioner has been deprived of rights

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[15] We may exclude from consideration those commitments to Matteawan which flow from the criminal process as different considerations of policy may be involved (see, *Lynch* v. *Overholser,* 369 U. S. 705, 715-717). In any event, such persons must have counsel. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

upon which all others have a claim. The statute challenged here is subject to every vice found present in the sterilization statute considered by this Court in *Skinner* v. *Oklahoma,* 316 U. S. 534 (1942) and is deserving of the same fate.

CONCLUSION

For the foregoing reasons the orders appealed from should be vacated and the case remitted with directions to sustain the writ of habeas corpus.

Respectfully submitted,

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APPENDIX A

State Law Relating to the Right to Counsel at Commitment Hearings

ALABAMA—Code of Ala., Tit. 21, §10:

"If, on the hearing of such inquisition, the person alleged to be of unsound mind is not represented by counsel the court shall appoint a guardian ad litem to represent and defend for him." See, *Smith* v. *Smith*, 254 Ala. 404, 48 So. 2d 546 (1950). See also, Title 21, §15.

ALASKA—Alaska Statutes, Title 47, Chapter 30, Section 070 (h) [47.30.070h]:

"An opportunity to be represented by counsel or advisor shall be given to the proposed patient, and if neither he nor others provide counsel or advisor, the superior court shall appoint a counsel or advisor * * * "

ARIZONA—Title 36 Revised Statutes, §514A:

"At the time of apprehension or during detention, but before the hearing, the proposed patient apprehended shall be permitted to consult an attorney to represent him at the hearing. If he is not represented by an attorney, the court shall, before the hearing, appoint an attorney to represent him."

ARKANSAS—

No provision relating to counsel.

CALIFORNIA—Welfare and Institutions Code, §5054:

"The alleged mentally ill person shall be present at the hearing, and if he has no attorney, the judge may appoint an attorney to represent him, or if a request is made for an attorney by the alleged mentally ill person the judge shall appoint an attorney to represent him . . . " See, *In re People for Best Interest and Protection of Campbell,* 12 Cal. Rptr. 60, 190 C. A. 2d 253.

COLORADO—Colorado Revised Statutes, 1963. Chapter 71 Article 1, §8:

"The court shall appoint an attorney at law who shall represent the respondent as his guardian ad litem in all proceedings thereunder. The guardian ad litem shall be given at least two days notice of the time and place of the first meeting of the medical commission and shall attend all meetings of the medical commission . . . "

CONNECTICUT—General Statutes (Revision of 1958), Title 17, Section 178, as amended by Public Act 199 (1963):

"Upon such complaint being filed in the probate court such court shall assign a time, not later than ten days thereafter, and place for hearing such complaint, and shall cause reasonable notice thereof to be given to the person alleged to be mentally ill . . . If such court is satisfied that such person is a dangerous person to be at large, it may make such order for his restraint and custody while the proceedings are pending as it deems advisable; but such person shall not be prevented from having all reasonable opportunities to consult counsel and friends and to prepare and make his defense to such application • • • "

DELAWARE—Revised Code, 1953, Chapter 51; 16 Delaware Code Annotated, §5101-5523. See also, Chancery Court Rules, 100-108:

No provision relating to counsel.

See, *Senate Hearings,* Testimony of Hon. John Biggs, Jr., pp. 127-129.

DISTRICT OF COLUMBIA—78 Stat. 944, §7 (d); D. C. Code, §21-356 (d):

"The allegedly mentally ill person shall be represented by counsel . . . and if he fails or refuses to obtain counsel, the court shall appoint counsel to represent him."

FLORIDA—Title 27, Chapter 394, §22 (4), 394.24 (4), Florida Statutes:

" * * * The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered and shall not be bound by the rules of evidence. An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court may appoint counsel."

Title 27, Chapter 394, §22 (7):

"b. At any stage of the proceeding the judge may, upon the application of any alleged incompetent who is indigent, appoint an attorney to represent said person . . . "

GEORGIA—Georgia Health Code, Acts of 1964, pp. 449, 534; Code of Georgia Annotated, Chapter 88, Section 506 (1964 Supp.):

"(d) • • • Provided, however, that in the event the allegedly mentally ill person shall be financially unable to employ counsel to represent said person in said hearing, then the [court of] ordinary shall appoint an attorney to represent said person • • • "

HAWAII—Revised Laws of Hawaii, 1955 (1963 Supp.), Chapter 81, §19-21:

No provision relating to counsel in the original court commitment. However upon what is apparently a *de novo* review by an "appeals commission,"

"The appeals commission shall hear and determine all cases brought before it on appeal. Upon such appeal the appellant shall have the right to be represented by counsel and to produce witnesses and to offer appropriate evidence for the person on whose behalf the appeal is prosecuted." Ch. 81, §40. See also, Ch. 14A, §§32, 34.

IDAHO—Idaho Code, 66-329 (g):

" • • • An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel and authorize a proper fee to be paid such counsel from the county funds."

ILLINOIS—Chapter 91-½, Section 8-22.1, Illinois Revised Statutes (as amended by Laws of 1965, June 9):

"(a) If the court determines that the person alleged to be mentally retarded or to be in need of medical treatment is indigent, the court shall appoint as counsel the public defender . . . "

Chapter 91-½, Section 7-2 (as amended by Laws of 1965):

"The magistrate or judicial officer shall identify himself and his official position and in simple, non-technical language and in a language known to the patient, shall explain to the patient the patient's rights under this Act, including that the patient shall have a hearing on the question of his need for medical treatment if he shall indicate his desire for a hearing and that at such hearing the patient will be represented by counsel and shall have the right to present evidence and cross-examine witnesses."

INDIANA—Acts of 1957, Chapter 359, Section 602 p. 1046; Burns Indiana Stat. Anno., §22-1216:

" * * * Unless the individual whose mental status is being inquired into has employed other counsel, the prosecuting attorney of the county of the allegedly mentally ill person's residence shall appear and represent such person in said proceedings."

IOWA—Acts of 1959 (G. A.) Ch. 152, §98; Iowa Code Annotated, Title 11, Ch. 229.5:

"Appearance on behalf of such alleged mentally ill person may be made by any citizen of the county, or by any relative, either in person or by counsel.

If at said hearing such person appears without counsel or appearance is made in his behalf without counsel, the commission, before proceeding further, shall inform such person or persons appearing for him of his right to legal counsel, then if no counsel is employed, the district court shall assign him counsel."

See also, 1948 Op. Atty. Gen. 67.

KANSAS—Laws of 1965, Ch. 348, Section 14:

"*Mandatory preliminary orders; procedure.* Upon the filing of the application provided for in section 13, the probate court shall issue the following:

(A) • • •

(B) • • •

(C) An order appointing an attorney to represent the 'proposed patient' at all stages of the proceedings • • • The 'proposed patient' shall have the right to engage an attorney of his own choice and, in such event, the attorney appointed herein shall be relieved of all duties by the court."

KENTUCKY—Kentucky Revised Stat. (1959) §202.050:

"In each inquest the court shall appoint a member of the bar to represent the interests of the defendant, and the attorney for the Commonwealth also shall prevent the finding of any person to be of unsound mind who, in his opinion, is not such."

LOUISIANA—Revised Statutes of 1950, Title 28, Sections 53-62:

No provision relating to counsel in sections relating to commitment. However Section 141, relating to the costs of the commitment provides:

"If financially able, the patient or his legally responsible relative shall pay the costs of commitment, including examination fees, expenses incurred in calling witnesses, fees of counsel for the patient, and fees of the commission, otherwise the parish of domicile in the case of a resident or the department in the case of a non-resident shall pay these costs."

MAINE—Revised Statutes, 1964, Title 34, §2334:

"• • • An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel • • • "

MARYLAND—Code of Maryland, Article 59:

No specific statutory provision.

See, *State ex rel. Adams* v. *May,* 196 Md. 152, 75 A. 2d 839, at 842:

"• • • The Attorney General informs us that in at least one county the court appoints counsel for the alleged insane person and has the testimony reported by a court stenographer. We think the statute at least authorizes this procedure."

MASSACHUSETTS—General Laws, Chapter 123, §51:

"• • • Upon receipt of an application for commitment the court shall cause written notice to be personally served upon the person named therein, informing the said person of the application for commitment and of his right to a hearing at which he can be present and be represented by counsel • • • "

MICHIGAN—Compiled Laws of Michigan, 1948, §330.21:

"* * * The court to whom the petition is directed may dispense with such personal service or may direct substituted service to be made upon some person to be designated by it * * * In such cases the court shall appoint a guardian ad litem to represent such mentally diseased person upon such hearing, and in other cases it may appoint a guardian ad litem * * * "

See, *In re Wojtasiak,* 375 Mich. 540, 134 N. W. 2d 741 (1965) which seems to hold that there is a constitutional right to counsel in proceedings to recommit a felon in a post-sentence expiry case.

MINNESOTA—Laws of 1963, ch. 258, §2; M. S. A., §525.751 (4):

"* * * If the patient so requests or is held for observation under order of the court, the court shall appoint counsel for him, if he is financially unable to obtain counsel. In all other cases the court may appoint counsel for the patient if it determines the interests of the patient requires counsel."

See, *State ex rel. Anderson* v. *U. S. Veterans Hospital,* 268 Minn. 213, 128 N. W. 2d 710 (1964).

MISSISSIPPI—Miss. Code Anno., §6909-07, 08:

No provision relating to counsel.

MISSOURI—Vernon's Annotated Missouri Statutes, §202.807 (4):

"The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure . . . An opportunity to be represented by counsel

shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel."

MONTANA—No provision relating to counsel.

NEBRASKA—Laws of 1947, c. 335, §16, p. 1061; Rev'd. Statutes of 1943, §83-325:

"• • • Any citizen of the county or any relative of the person alleged to be mentally ill, may appear and resist the application; the parties may appear by counsel."

See *Senate Hearings,* Testimony of Dr. C. H. Farrell, p. 163 to the effect that the Public Defender represents all defendants requesting counsel.

Session Laws of 1963, ch. 524:

"Medical Care for Drug Users

• • •

(2) The alleged drug-using person, referred to in sub-section (1) of this section shall be represented by counsel. If the court determines that he is financially unable to obtain counsel, it shall appoint counsel for him • • • "

NEVADA—Revised Statutes §433.200:

"(1) • • • The judge may direct the clerk of the court to issue subpoenas for the attendance of witnesses at the examination of the person, assign counsel to defend such person . . . and enter such other orders as he may consider necessary to permit a proper determination concerning the mental condition of, and to protect the rights of the person alleged to be mentally ill."

NEW HAMPSHIRE—See generally N. H. Rev'd. Stat. (1964), Chapter 135.
No provision relating to counsel.

NEW JERSEY—Laws of 1919, c. 97, §20, p. 234; N. J. S. A. 30:4-41:

"In all cases where the patient is confined in an institution before the final hearing, the county adjuster shall serve or cause to be served personally upon the patient a written notice of the time and place of final hearing and shall give notice to the plaintiff and the patient's nearest relative. The chief executive officer [of the institution] shall afford the patient every opportunity to appear personally or by attorney at the hearing, and assist him in communicating with his friends, relatives or attorney * * *"

See *Senate Hearings,* Testimony Chasen, at pp. 226-27:

"* * * I assume that he [the proposed patient] would probably find the bar in our State responsive were a request made for counsel. * * *

But I have never, in over 30 years of practice, heard of an application being made . . . except where large amounts of money are involved . . . very rarely is there an actual adversary proceeding."

NEW MEXICO—Laws of 1953, ch. 182, §5; N. Mex. Stats. Anno., §34-2-5:

"f. * * * An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel."

North Carolina—See generally, General Stats., §122-64 and 65:

No statutory provision relating to counsel.

Cf., *In re Wilson*, 257 N. C. 593, 126 S. E. 2d 489 (1962).

North Dakota—S. L. 1957, ch. 196, §3; R. C. 1943, 1957 Supp., §25-0311 (6); N. D. Century Code, §25-03-11 (6):

"• • • An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the mental health board, upon request of the proposed patient, shall appoint counsel. If it is determined that the proposed patient is unable to pay for such counsel, the attorney [sic] fees, upon approval of the mental health board shall be paid by the county."

Ohio—Baldwin's Ohio Revised Code, §5122.15 (1964):

"• • • The individual named [as defendant] in the affidavit shall be notified by the court of his right to secure counsel. The court may appoint, at any time in the proceedings, an attorney to represent a person who is alleged to be mentally ill • • •"

Oklahoma—See generally, Laws of 1953, §55, p. 163, as amended; 43A Okla. St. Ann., §55:

No provision relating to counsel.

Oregon—O. R. S. 426.100:

"If the allegedly mentally ill person, when brought before the court, requests the assistance of counsel to

represent him at the proceedings provided for by O. R. S. 426.070 to 426.150, the court shall give such person opportunity to obtain such legal counsel. If no such request is made by the allegedly mentally ill person, his legal guardian, relative or friend may, in the order named, request assistance of legal counsel. If no request for legal counsel is made by any party, the court may, at its discretion, appoint legal counsel. In all cases such legal counsel shall be present at the hearing and examination and may examine all witnesses offering testimony, and otherwise represent such person."

PENNSYLVANIA—See generally, P. L. 533, art. III, §327 (June 12, 1951) as amended; 50 P. S. §§1201-1203:

No provision relating to counsel other than 50 P. S. 1202 (c) which provides:

"The commission shall hear such evidence as may be offered or they may require, relating to the mental condition of the person sought to be committed, as well as, his or his counsel's statement * * *"

RHODE ISLAND—Gen. Laws 1956, 26-2-13; G. L. 1938, ch. 71, §7; General Laws of Rhode Island, Annotated (1956), §26-2-13:

"In all cases, whenever a person is apprehended and held for examination upon the question of his or her sanity before any court or commission authorized by this chapter to hear such question, and such person is by reason of poverty unable to employ counsel . . .

The court or commission before whom any such hearing shall be had shall forthwith, upon the apprehension of such person, appoint counsel to make the defense provided for in §26-2-11 * * *"

South Carolina—Code of Laws, 1962, §32-962:

"* * * An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel for him."

South Dakota—Laws of 1953, ch. 178; Laws of 1959, ch. 174; Code of 1939, §30.0107:

"* * * In its examination, it [the board] shall hear the testimony for and against such application, if any is offered . . . The person charged with being mentally ill or any citizens of the county or any relative of the person alleged to be mentally ill may appear and resist the application, and any person authorized to appear may appear with counsel * * *"

Tennessee—Acts of 1919, ch. 17, §10; T. C. A., §33-508:

"The county judge or chairman shall proceed with the hearing to determine whether the person in question is insane or not. Before proceeding, however, the court shall appoint a guardian ad litem to look after the interest of the person in question, but said guardian ad litem need not be, but may be, an attorney at law, but he shall be present at the hearing and manage the case in behalf of the person suspected."

TEXAS—Acts of 1957, ch. 243, §43; Vernon's Annotated Texas Statutes, 5547-43:

"When a Petition and the required Certificate of Medical Examination for Mental Illness are filed, the county judge shall set a date for a hearing to be held within thirty (30) days of the filing of the Petition, and shall appoint an attorney ad litem to represent the proposed patient."

UTAH—Laws of 1963, ch. 160, §1; Utah Code Anno., §64-7-36G:

"* * * An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel the court shall appoint counsel."

VERMONT—Laws of 1959, No. 185; 18 Vt. Stat. Anno., §2602:

"In any proceeding before a county, municipal or probate court involving the involuntary commitment of an alleged insane person to a mental institution, such person, or any resident or non-resident guardian or next friend or relative of such person, acting for such person, shall be afforded counsel, and if the alleged insane person is unable to pay for same, compensation shall be paid by the state to counsel assigned by the court . . ."

VIRGINIA—Laws of 1958, c. 595; Code of Virginia, §37-62:

"In any proceeding for commitment under this title, the judge upon whose warrant such proceeding is being held shall ascertain if the person whose commitment is sought is represented by counsel. If such person is

not represented by counsel such judge shall appoint an attorney at law to represent such person in such proceeding * * *"

WASHINGTON—Laws of 1959, ch. 25; RCWA, §70.02.190:

"If no guardian of the person has been appointed, the court may appoint a guardian ad litem to represent the patient during proceedings. The person filed against shall have the right to be represented by an attorney if requested."

See, *State ex rel. Richey* v. *Superior Court,* 59 Wash. 872, 371 P. 2d 51 (1962).

WEST VIRGINIA—Acts of 1965, ch. 98; W. Va. Code of 1961 (1965 Supp.), §2661:

"* * * The mental hygiene commission shall appoint a guardian ad litem who shall be a competent attorney, for the individual, and said guardian shall be present at the hearing and protect the interests of the individual * * *"

WISCONSIN—West's Wisconsin Statutes Annotated, Title 7, §51.02 (4):

"At any stage in the proceedings, the court may, if it determines that the best interest of the patient requires it, appoint a guardian ad litem for him."

WYOMING—Laws of 1963, ch. 188, §12; Wyoming Stat., §25-60 (d):

"... If the court has reason to believe that notice would be likely to be injurious to the proposed patient, and so finds in its order for notice, notice to him may

be omitted, but in such case notice shall be given to legal counsel appointed by the court to represent the proposed patient if no relatives, spouse or guardian reside within the county * * * In addition the notice shall apprise the person of the purpose of the proceeding . . . the identity of legal counsel appointed by the court to represent the proposed patient and the latter's right to counsel of his own selection . . . "

APPENDIX B

CASES HANDLED BY LEGAL AID OR DEFENDER AGENCIES

Agency	Period Covered	Cases Handled	Committed	Not Committed
Mass. Defender's Committee, Worcester County	7/1/63–6/30/65	6	5	1
Public Defender, San Francisco	7/1/64–6/30/65	101	61	40
Atlanta Legal Aid Society	†	10	3	7
Public Defender Cook County, Ill.	12/1/63–11/30/64	6,174	5,223	951
Legal Aid Agency, D. Col.	1964	639	416	223
Public Defender, Benton County, Wash.	2/1/65–9/15/65	7	7	0

APPENDIX C

DEFENDER ASSOCIATION OF PHILADELPHIA
SUITE 800 DEWEY BUILDING
PHILADELPHIA, PENNSYLVANIA

DEFENDER'S REPORT FOR THE MONTH OF MAY

June 4, 1965

Lunacy Commission Hearings

Aided by the grant from the National Defender Project, the Association is supplying counsel to sentenced clients whom the prison authorities claim are mentally ill and committable to a state hospital for mental diseases. Representation follows the filing of a petition for a lunacy commission and the appointment of such a commission to examine the prisoner and report whether the prisoner is mentally ill or mentally defective and, if so, whether he is of criminal tendency. If a prisoner is found to be mentally ill or defective and of criminal tendency, the commission recommends commitment to Farview State Hospital for the Criminally Insane. On the other hand, if the prisoner is found to be mentally ill or defective without criminal tendency, the commission recommends that he be committed to an ordinary state mental hospital.

Our attorneys have appeared at lunacy commission hearings for the last six months. During that period, it has become increasingly clear that our services in this area are vitally needed for the protection of clients who become the subject of lunacy proceedings. The scope, nature and value of our services are illustrated in the following reports submitted by Association lawyers who appeared at lunacy hearings:

1. November 30, 1964

Lunacy Commission Hearing: Frank W

On November 24, 1964, a lunacy commission was convened to examine Frank W, an inmate at the State Correctional Institution, 21st and Fairmount Avenue, Philadelphia. The Commission, which met at the prison where the inmate was incarcerated, was composed of Frank A. Bove, M.D.; Horace J. Prescod, M.D.; and Richard H. Knox, Esq. Following is a report of the proceedings:

Prior to meeting with the Commission, I interviewed the inmate for an hour and a half. He was suspicious of me because he felt everyone was attempting to send him to Farview. He realized that his sentence would be served in a year and he felt that the officials were attempting to detain him in any way possible. I showed him my credentials and assured him that I was there to protect his rights before the Commission. Having won his confidence, I proceeded to get him to tell me his story, all of which he would retell to the Commission later that day.

The Commission met at 1:30 P.M. It commenced the proceedings by questioning the prison psychiatrist who had examined the inmate and whose report on the mental condition of the inmate is part of the findings submitted to the Court. This report was made on the basis of one interview of an hour's duration and was admittedly very inconclusive because of lack of observation of the inmate. The discussion with the psychiatrist preceded the interview of the inmate by the Commission and was held out of the presence of the inmate.

The interview with the inmate lasted over two hours, the inmate doing over 95 percent of the talking. He retold the story of his trial and of how his lawyer did a very

poor job (his major complaint was that the woman he was accused of raping had lived with him for ten years and that he had photographic proof of this, in addition to witnesses to testify to this, but that the lawyer proceeded to trial without the witnesses and photographs. This is borne out by the record but the defendant agreed at the commencement of his trial, according to the record, to proceed without this testimony necessary to his defense.) He related that he had been promoted in almost all his work assignments in prison and cited all his skills and accomplishments while working in prison. At almost all points of his narration however, he implied he was persecuted by others and this is how he accounts for serving over nine years of a four to ten-year sentence.

He concluded his interview by telling the Commission of his recent invention which would allow an airplane to land safely if it lost all of its power while in flight. He noted he did not have a working model of this device for lack of equipment. He refused to give details of this device to the Commission, except for a drawing of an airplane with numbers placed at various spots around the plane. This refusal stemmed from his feeling that if he gives information to anyone except a potential investor, he will be left out of the development of the device. He wrote a letter to the F. B. I. to inform them of this invention, and in censoring the mail, the prison authorities came across the letter. This letter was apparently one of the prime reasons motivating prison officials to initiate proceedings to determine whether the inmate needed treatment at a mental institution.

After the Commission concluded its interview, the prisoner left and I reiterated to him how the decision of the Com-

mission is reached. I then went before the Commission and advanced my opinion to them, namely, that I felt the inmate was in need of medical treatment but that he was not a violent person and definitely would be harmed by an institution like Farview. I recommended that he be sent to an institution which does not have maximum security, like Norristown. At this time, I requested a copy of the Commission report which will be filed with the Court.

It seems to me that our vital service in this area is counselling the Commission in the different natures of the institutions to which an inmate can be committed. To do this well, we must be familiar with the institutions themselves, their facilities and what type of persons they will accept. At the same time, it is necessary to interview the inmate before the hearing to apprise him of the nature of the proceedings, to calm his anxieties about being "sent away", and to aid him in communicating his story to the Commission.

MARTIN K. MILLER

2. December 9, 1964

Lunacy Commission Hearing: William R

Commission consisting of Manuel Sall, M.D., psychiatrist, Richard J. Chodoff, M.D., and John A. Geisz, Esq., met at 1:10 PM, this day, at the Eastern State Penitentiary with a prison psychologist, Mr. Wadell, and the Defender present and interviewed the prisoner, William R, for about 40 minutes, and as a result of the interview, recommended that the prisoner required psychiatric treatment, was a prime object for treatment at a mental hospital, and did not require incarceration at a maximum security institution, such as Farview, and that he was not dangerous to society but only to himself.

As Defender, I asked Dr. Sall, psychiatrist to explain the commission proceedings to the prisoner and then I introduced myself as the defender and determined that he understood the proceedings and that he desired the presence of the counsel of the Defender, and that he desired to be sent to a mental hospital for treatment. At that point, I stood mute and allowed two or three questions at the close, and remarking after the prisoner left, that hopefully he could be transferred to a low security mental institution, since that was his desire.

The prisoner appeared to this defender to merit the diagnosis and recommendations of the commission. He was guilt ridden, talked about hearing his deceased father's voice suggesting suicide to him, about being uninterested in social contact or activities, admitted hating the voice and figure of authority, i.e., cops, guards, which the good doctor diagnosed as an identification with his hatred of his father. The doctor said he was not having a true hallucination but relating his own thoughts through this medium.

Since psychiatric questioning is a method of carefully suggesting answers and attempting to elicit the prisoner's true behavior, the only way we can serve the defendant's wishes, is to be qualified in the same methods. I feel that when the commission is not agreeable to the prisoner's desires for or against transfer, I would have been at a loss to either intelligently cross-examine in order to demonstrate more or less of the prisoner's behavior or to argue psychologic theory calculated to persuade the commission with the prisoner's desires.

MICHAEL HILLEGASS

3. December 16, 1964

Lunacy Commission Hearing: Michael C

On December 2, 1964, a lunacy commission was convened to examine Michael C, an inmate at Holmesburg Prison, serving a sentence for burglary, larceny, and receiving stolen goods (11½ to 23 months.) C had 70 days time until the expiration of the minimum sentence. The commission was composed of Laurent B. Houle, M.D., Thomas B. Force, M.D., and John B. Hannum, Esquire, and had been appointed by Judge Griffiths upon petition of the prison warden (the prison psychiatrist had made the recommendation.) Prior to the hearing, I spoke with C. I informed him of the nature of the hearing and the power of the commission. I stated that he could confide any special concerns or feelings in me. Speaking coherently, though nervously, he said that he knew he needed some mental treatment; he had had treatment in a Kentucky hospital for the use of drugs and had found it helpful; he had rejected the suggestion of our office at the time of trial in June 1964 that he be committed to a mental institution in lieu of sentence and now thought he had been unwise; he was concerned, however, that he not be sent to Farview because he knew of two persons who had returned from Farview with obvious welts and bruises from beatings; he would accept a commitment beyond the 70 days remaining time for his minimum sentence at Holmesburg. Questioned about his prison experience, he stated that he preferred to be in "OBS" which he explained was "observation" because it was quiet, and when he had been returned to the cell block, [another prisoner] beat him up; therefore, to escape the harassment on the cell block, he slit his wrists for the sole purpose of being returned to OBS.

The commission met at 6:15 p.m. at the prison. The prison psychiatrist was not called (as in the case of Frank W), the commission relying solely on written reports. Furthermore, the hearing—which lasted about a half hour—consisted simply of a talk with the defendant. After members of the commission had finished questioning the defendant, I elicited the information he had confided to me because I felt it would help him. In particular, I had him tell the commission of his fear of Farview and preference of Byberry or Norristown hospitals. After the interview with C, I simply stated to the commission that I felt it would be inappropriate to find C had criminal tendencies (which would result in his commitment to Farview.) Although neither of the two doctors on the commission were psychiatrists, I felt that any objection of a legal nature should not be made in the presence of C and I made none.

The commission submitted its report to Judge Griffiths (Form MH 46-3-63) containing the following:

1) finding that C *is* in need of care in a mental institution for the following reason: "that he is in such condition as to require observation, diagnosis and treatment" (as opposed to finding him either mentally "ill" or mentally "defective"); &

2) opinion that C *is not* of criminal tendency.

On December 7, 1964, Judge Griffiths approved the report and signed an order committing C to Philadelphia State Hospital at Byberry until further order of court or until otherwise dischargeable under the provisions of section 348(b) of the Mental Health Act of 1951, as amended. This office was given the statutory ten days to object.

4. January 14, 1965

Lunacy Commission Hearing: Thomas A. C

On January 14, 1965 at 8:30 AM at the County Prison, Holmesburg, Pa. a lunacy commission was convened to examine and evaluate Thomas Augustus C. Present were the following:

James P. Ramsey, M.D.
Paul Sloane, M.D.
Hardy Williams, Esq.
Eugene V. Alessandroni, II, Esq.
Defender Association of Phila.

Before the inmate was brought into the room, Dr. Sloane read the reports prepared by the prison psychiatrist and the prison warden. These reports stated the inmate's prison behavior. In essence they were as follows:

> The inmate was a model prisoner for the first two years of his incarceration. His trouble began approximately seven months ago. Since then he has been in and out of the OBS and maximum supervision blocks. He set fire to bedding, destroyed furniture, threatened the Prison nurse and guards with violence, assaulted fellow inmates, slashed the outer portion of his arm, and had a hypodermic needle and syringe in his possession. He has been on medication and was on medication at the time of the Commission's meeting. Parole was denied in April 1965. This decision is to be reconsidered in 1965.

Inmate was then brought into the room. He appeared to be calm and collected and gave no outward signs of insanity or mental problems. He was introduced to all the Board

members and I explained the purpose of my being at the meeting.

The members of the board then took over and asked the inmate many questions about his prior behavior. C answered all the questions and was quite polite and well aware of what was going on.

He stated that he would have moods and that he was capable of violence at these times. He does not want to hurt anyone and does not want to be hurt himself. He stated that most of his misbehavior was planned and that he did these acts so that he would be transferred to a State Penitentiary. He explained that he had applied for a transfer on at least two prior occasions and that he had been turned down without a reason being given. He feels that he would be happier in the penitentiary. His knowledge of the penitentiary has been gathered from talking with other inmates. He was asked if he would want to go to a hospital and he said that it might not be a bad idea because he would like to find out why he has the moods which seem to cause some of his problems.

After the inmate left the room, we all discussed the case and it was decided that this man should be sent to Norristown State Hospital and that on his release he could be sent to the penitentiary if that was desirable in light of any findings at Norristown.

EUGENE V. ALESSANDRONI

5. January 15, 1965

Lunacy Commission Hearing: Carmen S

This took place at Graterford in the presence of Lewis S. Cali, Esquire and Drs. William A. Harvey and John B. McNally.

Dr. Harvey conducted most of the hearing. The defendant presented a very pitiful appearance. He had been, since the middle of November, in a state of mental stress consisting of delusions and hallucinations. He had broken windows in his cell, flooded it, torn sheets and blankets. He inflicted superficial wounds on himself, has refused to eat, speaks of hearing voices. Had taken some medication and refused others and from time to time refused to eat, stating that this was dictated to him by voices he heard. Dr. Harvey and Mr. Cali had prior to the hearing interviewed the step-mother of the defendant in the waiting room and she stated that she wanted no part of him. However, after the hearing she spoke to me and intimated that she was suspicious of star chamber proceedings. I tried to assure her of the fact that I had been present to protect his interest but I am afraid I did not succeed too well. At the conclusion of the hearing I suggested to Dr. Harvey that I did not like some of the wording of the findings, particularly that the defendant was of criminal tendencies. He agreed with me that the findings should indicate that the defendant, if well, would not be inherently criminal or of criminal tendencies but that his illness made him so. I suggested that such a finding be incorporated in the form that was furnished by the Quarter Sessions Court. In my own mind there is no question but that this man is at the present time incapable of normal action. His thinking is disconnected, his memory poor and confused and he has unquestionable persecutory and depressed hallucinations. He spoke constantly of hearing voices which dictated actions that were harmful to him, such as not eating in order to starve to death, pour cold water over himself in order to freeze himself to death and hot water in order to scald himself.

ISAAC PEPP

6. January 28, 1965

Lunacy Commission Hearing: Robert, J

Held at State Correctional Institution at Philadelphia
Present: Mr. DiCintio and Dr. Lehman of Commission

Dr. Cole of Commission not present
Mr. Woodell of Prison
Mr. Isaac Pepp for Defendant

Mr. Woodell of prison gave history of defendant's behavior.

He was persecuted by all actions of prison authorities. All rules were directed against him personally, would not eat at times—suspicious that food was not proper on religious grounds (Defendant is a Muslim).

Defendant will not talk to white persons and only to such negroes as are Muslims.

Defendant was placed in "Hole" for talking in ugly manner to the Warden regarding his food.

Defendant refused to appear before Commission. We adjourned to before the cell of defendant. He refused to talk to anyone.

I tried to introduce myself to defendant as representing him. He imperiously ordered me to leave.

NOTE: This defendant incarcerated for parole violation

Basis: refused to work

ISAAC PEPP

7. February 16, 1965

Lunacy Commission Hearing: Earl X. B

On January 6, 1965 a Lunacy Commission was convened to examine Earl B, an inmate at Holmesburg Prison, who had

been under observation there since shortly after his arrest for vagrancy, disorderly conduct and resisting arrest. The Commission was composed of Kenneth K. Kool, M.D., a psychiatrist, Myron A. Zacks, M.D. whom I learned specialized in ear, nose and throat medicine and Edward Dicker, Esq.

Before the hearing I had interviewed Mr. B at his cell at Holmesburg Prison. It seems that he had been taken to the Detention Center where he had immediately gone on a fast in accordance with his beliefs as a member of the Black Muslim movement. He was transferred to Holmesburg for observation and had been lying in his cell with a shirt over his head for hours at a time. He hated white men and was being handled only by Negro personnel. For this reason, the authorities would only let me talk to him in his cell. At his cell I had a stormy interview with Mr. B who kept reiterating his Muslim beliefs and arguing that he had done nothing and ought to be let out. I somehow managed to get through to him the fact that the lunacy commission was about to sit to consider his mental competency. The interview ended inclusively when I was informed that the Commission had called for Mr. B's appearance before it.

When I next saw Mr. B he was escorted to the hearing room by two Negro prison guards who remained outside within view of the chair in which Mr. B was seated. He had changed from the ranting vindictive man I had met at the cell into a quite, reasonable person who responded very well to the questions of the commission. Dr. Kool, the psychiatrist, did most of the questioning.

It appeared that the defendant aged 30 had become a Muslim about 5 years earlier. He had only completed eight grades of education and had spent most of his boyhood working on truck farms in New Jersey. He had served

satisfactorily in the army for three years, and worked steadily as a construction worker or window washer. He does not know the whereabouts of his parents or his brothers of sisters, and is, in every sense, a "loner" except for his fanatical attachment to the Muslim movement.

Before his arrest, he had crossed Market Street at 30th. A white man, whom defendant apparently knew, had called him back on the theory, as defendant put it, that he was afraid to come back and face him. Defendant went back at which point he claimed the white man hit him with a club in the head. Defendant hit the man only after being struck himself in the head.

His defense to the resisting-arrest charge was that he had not done it because he had been arrested by a Negro officer and that one of the tenets of his faith was that he will accept any authority imposed upon him by a "Black Brother". Defendant stated that he would only use force in self defense, and that he had no fear of death. Although he has spent a good deal of time proselytizing on behalf of the Muslim movement, including selling the newspapers of Elijah Muhammid, he stated that he realized that beliefs could not be forced upon people.

Defendant testified that he had no visions or hallucinations and, in response to my question on "cross examination", brought out the fact that the man that he follows on earth is Elijah Muhammid, a living person, who resides in Chicago and occasionally visits Philadelphia. I stressed this for the reason that I thought at least two members of the panel might think that the mention of the name Elijah indicated that defendant was speaking of a supernatural person. I also brought out the fact that defendant had only one prior arrest for resisting arrest so as to dispel any possibility of the commission's finding that the defendant's

mental state resulted in criminal tendencies so as to cause him to be sent to Farview Hospital for treatment.

In response to the question of another member of the panel, defendant answered perfectly the question of what he would do with an envelope that he found on the street addressed to someone else in which he could see a $10 bill.

Although I had fears of the hostility of at least two members of the panel to the Muslim views asserted by the defendant, I was pleased to learn from the head of the panel that the group unanimously voted in favor of reporting to the Quarter Sessions' Court that Mr. B was not in need of any treatment.

SAMUEL T. SWANSEN

8. March 5, 1965

Lunacy Commission Hearing: Alvey Edward C

I attended hearing during my weekly visit to Graterford on March 5, 1965. Interviewed defendant before hearing.

Attended briefing by Clayton of Prison concerning actions of defendant that led to their asking for a commission. He indicated that at present time the defendant seemed to be in remission and did not appear to be psychotic.

I gave the Commission my impression of the defendant and hastily reviewed the cause of his incarceration.

The defendant was brought in and questioned. He gave good account of himself, was lucid, coherent and precise in his language. He expressed contrition of his acts and hoped to be able to make a go of things.

The Commission came to the conclusion that defendant was not committable and should "be kept under observation and treatment". Such a finding will be filed. There will be no finding of "criminal tendencies". Concern of possible re-

mission was expressed. Possibility of better treatment at 21st Street was suggested as a result of prodding by me but was only mentioned as it was "an administrative decision" and not the proper subject of a finding by the commission.

I had in the file a report from Norristown on this defendant and Mr. Clayton referred to the possibility of the defendant being there but that he did not have any confirmation or report from that institution. I had gone over this report with the defendant earlier and made it available to the Commission.

Query: Should I have done this?

Forgot the most important part: The defendant was very happy to know his interests would be looked after.

ISAAC PEPP

9. May 7, 1965

Lunacy Commission Hearing: Larry M

The Commission consisted of Laurent B. Houle, M.D., Edward B. Polin, M.D., and Raymond L. McConemy, Jr., Esq. Also present were Dr. Harvey Levine, Resident Psychiatrist of Philadelphia General Hospital, and Miss Ellen Rice, Staff nurse. The hearing was heard on the eighth floor of Mills Building of Philadelphia General Hospital.

I arrived an hour and one half before the scheduled hearing and conferred with Dr. Levine and the defendant.

Dr. Levine informed me that I would be able to get little help from Mr. M, hereafter referred to as the "patient". The patient was apparently born retarded and when younger suffered a form of epilepsy which subsequently produced some brain damage. The patient is approximately twenty-eight years of age, but his actual birth date is un-

known because of his inability to answer questions. He was apparently sentenced on a charge of indecent exposure from a 1962 bill of indictment and has been in several prisons since that time. The patient was unable to furnish any information as to where he has been or as to the details of his crime. He was brought to Philadelphia General Hospital from Holmesburg Prison on March 27, 1965 with a statement from the prison that he was confused, uncontrollable and severely psychotic. Dr. Levine informed me that he was unable to establish communication with the patient, whose brain damage is apparently permanent, but that he did not think the patient had either violent or criminal tendencies.

I attempted to speak with the patient who presented a very pitiful sight. He sat in a chair mumbling, apparently understood some of my questions, but his answers were not very lucid.

The patient appeared before the Commission and in answer to questions of the doctors, convinced them that he was nonviolent and did not harbor criminal tendencies. The patient sat quietly in a chair, mumbling, and made little sense other than to state that he had no hallucinations, liked everybody and was happy where he was.

The patient's parents also appeared and expressed an interest in seeing their boy frequently. The parents are very slow, and are apparently unaware that their boy was, as a youth, mentally retarded.

Dr. Levine stated to the Commission that the patient frequently had his fly unzipped at Philadelphia General Hospital, and he assumes that it is because the patient knows no better. It is probable that this was how his "crime" was committed.

It was apparent to the doctors on the Commission that the patient was not a criminal. They felt he was mentally deficient and functioning at the lowest possible level of a human being. There is no hope for his recovery as the brain damage appears permanent. However, he seems to be well adjusted to Philadelphia General Hospital, and the Commission felt that since he is not violent, has no criminal tendencies, and that his parents wish to visit him often, that the best interest of the patient and the Commonwealth would be served by committing him to Byberry. It is my opinion that the Defender's Office does a great service to patients or prisoners who are the subject of a Lunacy Commission Hearing. In this instance, I was able to explain to the Commission that Farview would not be the place for this unfortunate man, and the Commission readily and eagerly accepted my advice. I feel that it is very likely that the patient would have been committed to Farview had a representative of the Voluntary Defender's Office not been there to represent his interests. I also feel the Commission was not fully aware of the difference between Farview, Byberry, Norristown, etc.

ROBERT L. BENNETT

STATISTICAL SUMMARY

In the month of April, the Association served 1139 persons: 85 in bail cases, 296 in prison cases, 33 in the Federal Court, 577 in Magistrates' Courts, 111 having post-conviction problems and 37 through special and advisory services. During the month there were 368 interviews held at the Philadelphia Prisons and 774 Defender cases listed for trial.

Respectfully submitted,

HERMAN I. POLLOCK

APPENDIX D

Letter From Hon. Michael Di Salle to Hon. Sam Ervin Appearing in Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Eighty-seventh Congress, First Session (1961) at pp. 123-124.

The State of Ohio,
Office of the Governor,
Columbus, March 20, 1961.

Hon. Sam J. Ervin, Jr.,
U.S. Senator
Senate Office Building, Washington, D.C.

Dear Senator:

Thank you very much for your very kind inquiry of March 16. I appreciate Senator Lausche's suggestion that you write to me.

Two years ago, I began a hospital-by-hospital visit in Ohio. We have 25 mental institutions. In my visits I was quite struck by the number of people over the age of 65 who had been committed to our institutions. Upon inquiry from the central office and an inventory and diagnosis of the patients, we found that 25 percent of our patients were over the age of 65—9,000 in number—and of this number, approximately half, or 4,500 were not psychotic or mentally ill in the commonly accepted sense.

These people were there as a result of someone refusing to accept the responsibility of their care or not being able to assume the responsibility. In many cases local subdivisions found that committing these people to mental institu-

tions would eliminate a local financial burden and they were perfectly willing to have the State assume it.

We have now begun a program of releasing these people to nursing or rest homes, transferring them to the welfare program where they rightfully belong. To date, we have transferred 1,500, and we may very well reach a total of 3,000 before we complete this project.

The significant thing to me was that, under the State commitment law, this was possible. We are recommending to this session of the legislature a change in commitment laws in order that the State mental health department may have a chance to observe the potential patient for a period of 30 to 60 days before commitment. If we do not take this step, we will be having admitted almost automatically the same number of people who do not belong in our institutions.

This is harmful in many respects. It takes our limited facilities and divides them among people who are in need of treatment and people who are not. This increases the cost of the program, for these people are chronically ill, being senile, or, if they are not at the time of admission, many of them become greatly disturbed by their surroundings. We know how difficult it is for a well person to meet the contingencies of today. Just think how difficult it is for an older person to be put into an institution with mentally ill persons. How long can they withstand the disturbances that are bound to occur?

I feel that this is a problem which the States must meet in order to protect the constitutional rights of individuals who are in many cases wrongfully placed in mental institutions. I think that you will find that the most advanced

in the programs are arranging for voluntary and tentative commitments pending observation. This I think will go a long ways toward resolving the problem, but it has to be a 50-State effort and, consequently, any direction or education on this subject that would emanate on the Federal level would be extremely helpful.

You certainly are free to use my statement in any way you deem best.

Sincerely,

MICHAEL V. DI SALLE, Governor.

P.S.—Another phase that we are examining is the restoration of civil rights during a period of trial visit.

APPENDIX E

New York Laws Relating to Commitment in Force on December 6, 1961

1. Laws of 1950, c. 229, §2

[McKinney's N.Y. *Correction Law*, §375]

The grounds and property located at Dannemora, in the County of Clinton, and the buildings erected thereon, shall continue to be known as Dannemora state hospital. Such hospital shall be used for the purpose of confining and caring for such male prisoners as are declared insane while confined in a state prison, reformatory, penitentiary or institution for male defective delinquents, who have been sentenced or committed thereto for a felony and others provided for under section three hundred eighty-three. The department of correction shall have jurisdiction and control of such hospital; but it shall be subject to visitation and inspection by the head of the department of mental hygiene, by himself and his authorized representatives from the department of mental hygiene.

2. Laws of 1950, c. 229, §1

[McKinney's N.Y. *Correction Law*, §383]

Whenever the physician or the psychiatrist of any one of the state prisons, reformatories or penitentiaries or of the institution for male defective delinquents shall certify to the warden or superintendent thereof, that a male prisoner confined therein and sentenced or committed thereto for a felony or committed to or retained by the institution for male defective delinquents pursuant to the provisions of sections 338, 338-a, 438-b, and section 440, is, in his opin-

ion insane, such warden or superintendent shall cause such prisoner to be transferred to the Dannemora state hospital and delivered to the medical superintendent thereof. Such superintendent shall receive the prisoner into such hospital, and retain him there until legally discharged. The warden or superintendent, before transferring such insane prisoner, shall see that he is in a state of bodily cleanliness. At the time of such transfer there shall be transmitted to the superintendent of such hospital the original certificate of conviction and the certificate of insanity executed by the physician or psychiatrist, which shall be filed in the office of such superintendent who shall file a notice of such transfer in the office of the department of correction.

3. Laws of 1961, c. 429

[McKinney's N.Y. *Correction Law*, §§384, 385]

Section 1. Section three hundred eighty-four of the correction law, as amended by chapter three hundred seventy-seven of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§384. *Certification of insane prisoners after the expiration of their terms*:

1. Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director such prisoner continues insane, the director shall apply to a judge of a court of record for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge. The court in which such proceedings are instituted shall if satisfied that such person may require care and treatment in an institution for the mentally ill, issue an order directing that such person be committed to the custody of the commissioner of

mental hygiene to be placed in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such person by agreement between the heads of the two departments. The costs necessarily incurred in determining the question of insanity, including the fees of the medical examiners, shall be a charge upon the amount appropriated for the support and maintenance of the Dannemora state hospital, and be paid in the same manner as are other expenses of such hospital.

2. A patient committed to the custody of the commissioner of mental hygiene and placed in an appropriate institution in the department of mental hygiene or the department of correction pursuant to the provisions of this section may at any time during the period of his commitment be transferred to an appropriate state institution in the department of mental hygiene or in the department of correction, which has been designated for the custody of such patient by agreement between the heads of the two departments.

3. All persons retained in Dannemora state hospital pursuant to a valid order of retention issued in accordance with the provisions of this section prior to September first, nineteen hundred sixty-one shall be deemed to have been committed to the custody of the commissioner of mental hygiene pursuant to subdivision one of this section and shall be deemed to have been placed in the custody of Dannemora state hospital by designation of the commissioner of mental hygiene and the commissioner of correction pursuant to subdivision one of this section. Any such patient in the Dannemora state hospital may be transferred to any appropriate state institution of the department of mental hygiene or of the department of correction as may be desig-

nated for the custody of such patient by agreement between the heads of such departments.

4. §2. Section three hundred eighty-five of such law, as amended by chapter three hundred fifty-four of the laws of nineteen hundred fifty-nine, is hereby amended to read as follows:

§385. *Discharge of insane prisoners at expiration of terms*:

Notwithstanding any other provisions of law to the contrary, the director of the Dannemora state hospital may discharge prisoner at the expiration of his sentence, and who is still insane, but who has not been committed to the custody of the commissioner of mental hygiene and, in the opinion of the director, is reasonably safe to be at large. Such discharged prisoner shall be entitled to fifty dollars in money and suitable clothing adapted to the season in which he is discharged.

5. Laws of 1961, c. 504

[McKinney's New York *Mental Hygiene Law,* Section 76 as amended by,

Laws of 1964, c. 738, Section 6

[Renumbered McKinney's *Mental Hygiene Law,* Section 74]

Note: Material in brackets appeared in the 1961 law and was deleted by the 1964 amendment. Italicized material was added by the 1964 amendment.

§6. Section seventy-six of such law, as last amended by chapter five hundred four of the laws of nineteen hundred sixty-one, is hereby renumbered section seventy-four of

such law and as so renumbered is hereby amended to read as follows:

§[76] *74.* Review of [proceedings and] *court authorization* [order of certification] *to retain a patient.* If a person [certified to the jurisdiction of the department or an institution,] *whose retention, continued retention or transfer and continued retention has been authorized* pursuant to this [chapter] *article,* or any relative or friend in his behalf, be dissatisfied with [the final] *any such* order [of a judge or justice certifying him,] he may, within thirty days after the making of *any* such order, obtain a rehearing and a review of the proceedings already had and of such [certification] *order,* upon a petition to a justice of the supreme court other than the *judge or* justice *presiding over the court* making such [certification] *order,* who shall cause a jury to be summoned as in the case of proceedings for the appointment of committee for a mentally ill person where the question of fact arising upon the competency of the person is tried by a jury, and shall try the question of the mental illness of the [person so certified] *patient so authorized to be retained,* in the same manner as provided in said proceedings. *Any such patient or the person applying on his behalf for such review may waive the trial of the fact by a jury and consent in writing to trial of such fact by the court.* If such petition for rehearing and review be made by any other than the person so [certified] authorized to be retained or the father, mother, husband, wife or child of such person or the person with whom the person [certified] *so authorized to be retained* was residing at the time *of the making* of such [certification] *order authorizing continued retention* or accustomed to reside, before such rehearing or review shall be had, the petitioner shall make a deposit or give a bond, to be approved by a justice of the supreme court, for the payment of the costs and expenses

of such rehearing, review and determination of the question of mental illness by a jury as aforesaid, if the order [of certification] *authorizing continued retention* is sustained. If the verdict of the jury, *or the decision of the court when jury trial has been waived,* be that such person is [sane] *not mentally ill,* the justice shall forthwith discharge him, but if the verdict of the jury, or *the decision of the court where a jury trial has been waived,* be that such person is mentally ill, the justice shall certify that fact and make an order [of recertification] *authorizing continued retention under the original order* [as upon the original hearing]. Such order shall be presented, at the time of [the recertification] *authorization of continued retention* of such mentally ill person, to, and filed with, the director [or person in charge] of the [institution to] *hospital in* which the mentally ill person is [certified or to the institution or facility in the department designated by the commisioner to receive and retain such person as a patient] *authorized to be retained,* and a copy thereof shall be forwarded to the department by such director [or person in charge] and filed in the office thereof. Proceedings under the order shall not be stayed pending an appeal therefrom, except upon an order of a justice of the supreme court, and made upon a notice and after a hearing with provisions made therein for such temporary care or confinement of the alleged mentally ill person as may be deemed necessary. If a judge or justice shall refuse to grant an application for an order [of certification] *authorizing continued retention* of a mentally ill person proved to be dangerous to himself or others, [if at large,] he shall state his reasons for such refusal in writing, and any person aggrieved thereby may obtain a rehearing and review and the determination of the question of mental illness by a jury in the same manner and under like conditions as from an order [of certification] *authorizing continued retention.*